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## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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No. 72

THE UNITED STATES OF AMERICA, PETITIONER

VS.

MRS. JULIA CAROLINE SPONENBARGER, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR CERTIORARI FILED MAY 26, 1939  
CERTIORARI GRANTED JUNE 5, 1939





**United States Circuit Court of Appeals**  
**EIGHTH CIRCUIT.**

---

**No. 11,090**

**AT LAW.**

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**MRS. JULIA CAROLINE SPONENBARGER, ET AL.,**  
**APPELLANTS,**

**vs.**

**UNITED STATES OF AMERICA, APPELLEE.**

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES**  
**FOR THE EASTERN DISTRICT OF ARKANSAS.**

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**FILED JANUARY 15, 1938.**

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 72

THE UNITED STATES OF AMERICA, PETITIONER

vs.

MRS. JULIA CAROLINE SPONENBARGER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT

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1                      Praeceptum for Transcript.

In the United States District Court for the Western  
Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis; and St. Louis Union Trust Company, Appellants,

No. 7984. vs.

The United States of America, Appellee.

To the Clerk of the United States District Court for the Western Division of the Eastern District of Arkansas:

You will please prepare a transcript of the record in the above styled case for perfecting the appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and will include therein the following documents and records:

1. Petition (Complaint) filed August 11, 1934.
2. Stipulation for Transfer to Western Division.
3. Demurrer filed September 28, 1934.
4. Court Order on Demurrer.
5. Answer filed May 14, 1935.
6. Defendant's Motion to make Parties Plaintiff.
7. Court Order Sustaining Defendant's Motion to make Additional Parties Plaintiff.
8. Plaintiff's Assignment of Error, Re: Additional Parties.

9. Appearance and Protest of Grady Miller, as Receiver for the Southeast Arkansas Levee District.

10. Appearance and Protest of Alex H. Rowell and William R. Humphrey as Receivers of the Cypress Creek Drainage District.

11. Entry of Appearance and Answer of Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank in St. Louis.

12. Separate Petitions of St. Louis Union Trust Company Individually and in its Own Right and as Trustee for Bondholders in a Pledge Instrument and Mortgage Executed by the Cypress Creek Drainage District, and by Red Fork Levee District.

13. Second Answer of the Defendant.

14. Order Substituting Cypress Creek Drainage District as a Party Plaintiff.

15. Entry of Appearance of Cypress Creek Drainage District.

16. The complete Bill of Exceptions.

17. Judgment entered October 21, 1937.

18. Motion for New Trial filed by Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis.

19. Motion for New Trial filed by St. Louis Union Trust Company.

20. Court Order dated December 23, 1937, submitting Motion for New Trial filed by Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis.

21. Memorandum of the Court overruling said Motion for New Trial.

22. Court Order overruling Motion of St. Louis Union Trust Company for a New Trial.

23. Amended Judgment dated December 23, 1937.

24. Notice of Appeal.

25. Petition for Appeal.

26. Assignment of Errors.

27. Order Allowing Appeal.

28. Bond on Appeal.

29. Citation on Appeal and Acceptance of Service.

30. This Praecept for Transcript, and Acceptance of Service Thereof.

**JULIA CAROLINE SPONEN-  
BARGER, Appellant.**

By Lamar Williamson, Monticello,  
Arkansas, and

By E. E. Hopson, McGeehee, Arkansas,  
Her Attorneys.

**GRADY MILLER AS RECEIVER FOR  
THE SOUTHEAST ARKANSAS  
LEVEE DISTRICT,**

By Joseph W. House, Little Rock,  
Arkansas, and

By Lamar Williamson, Monticello,  
Arkansas,

His Attorneys.

**ALEX H. ROWELL AND WILLIAM R.  
HUMPHREY AS RECEIVERS FOR  
THE CYPRESS CREEK DRAINAGE  
DISTRICT,**

By DeWitt Poe, McGeehee, Arkansas, And

By Lamar Williamson, Monticello,  
Arkansas, And

By Hendrix Rowell, Pine Bluff, Arkansas,  
Their Attorneys.

**CYPRESS CREEK DRAINAGE DIS-  
TRICT.**

By DeWitt Poe, McGeehee, Arkansas, And

By Lamar Williamson, Monticello,  
Arkansas,

Its Attorneys.

**MERCANTILE-COMMERCE BANK &  
TRUST COMPANY AND MERCAN-  
TILE - COMMERCE NATIONAL  
BANK IN ST. LOUIS,**

By Fred Armstrong, Attorney, of Thomp-  
son, Mitchell, Thompson & Young, St.  
Louis, Missouri.

ST. LOUIS UNION TRUST COMPANY,  
INDIVIDUALLY AND IN ITS OWN  
RIGHT, AND AS TRUSTEE FOR  
BONDHOLDERS IN A PLEDGE AND  
MORTGAGE EXECUTED BY THE  
CYPRESS CREEK DRAINAGE DIS-  
TRICT,

By Henry Davis, Attorney, of Bryan, Wil-  
liams, Cave & McPheeters, St. Louis,  
Missouri.

ST. LOUIS UNION TRUST COMPANY,  
INDIVIDUALLY AND IN ITS OWN  
RIGHT, AND AS TRUSTEE FOR  
BONDHOLDERS IN A PLEDGE AND  
MORTGAGE EXECUTED BY THE  
SOUTHEAST ARKANSAS LEVEE  
DISTRICT,

By Henry Davis, Attorney, of Bryan, Wil-  
liams, Cave & McPheeters, St. Louis,  
Missouri.

Service of the foregoing Praecipe for Transcript is hereby  
acknowledged this January 7th, 1937.

FRED A. ISGRIG, United States District  
Attorney, Attorney for the Appellee.

Endorsed: "Filed Jan. 7, 1938, Sid B. Redding, Clerk."

4

### Petition.

In the District Court of the United States for the  
Eastern Division of the Eastern District of  
Arkansas.

Mrs. Julia Caroline Sponenbarger, Petitioner,  
No. 7984 vs. At Law  
The United States of America, Defendant.

Comes the above named plaintiff and for cause of action  
against the defendant, the United States Government, the  
plaintiff pleads and alleges:

### I.

The plaintiff, Mrs. Julia Caroline Sponenbarger, is a citi-  
zen of the State of Arkansas, and is a resident of Desha  
County, in the State of Arkansas.



## II.

This petition and suit is of a civil nature, and constitutes a claim founded upon the Constitution of the United States, Fifth Amendment; and upon an Act of Congress (being Public Document No. 391, 70th Congress, Senate Bill 3740; Title 33, U. S. C. A., sections 702a to 702m, inclusive, Chapter 15), being an Act entitled: "An Act for the Control of Floods on the Mississippi River and Its Tributaries, and For Other Purposes," approved May 15, 1928, hereinafter called the "Flood Control Act"; and is founded upon an implied contract of the Government of the United States to pay for damages in a cause not sounding in tort; and also involves the title of, and damage to, land and personal property situated in Desha County in the State of Arkansas.

5 The amount of the claim herein, exclusive of interest and costs, exceeds the value of \$3,000.00 and is less than the value of \$10,000.00.

## III.

The plaintiff alleges that under said Flood Control Act of Congress the United States adopted, and enacted into law, a project for the flood control of the Mississippi River in its alluvial valley, and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, 70th Congress, 1st Session, which engineering plan is commonly called the "Jadwin Plan." The Act provides for raising the levees of the Mississippi River generally for three feet, for improving the carrying capacity of the main channel of the River by revetment work, and for limiting the flood waters in this channel to its safe capacity through the provision of specified diversion channels. Among these is the Boeuf Floodway which will carry excess flood waters from a point below the mouth of the Arkansas River, through and over the plaintiff's land and property in Desha County, Arkansas, to and through the Boeuf River Basin into the back water area at the mouth of the Red River in the State of Louisiana. The Plan leaves the section of the Mississippi River levee running from approximately the mouth of Cypress Creek in Desha County, Arkansas, South to approximately Luna Landing in Chicot County, Arkansas (being the levee lying East of the plaintiff's property and heretofore protecting it against Mississippi River Floods), known as the "fuse-plug levee"; at its height on the date of the passage

of the Act; but as the levees elsewhere have been, and are to be, raised  $3\frac{1}{2}$  feet and materially strengthened, preventing overflow at other points, the volume of water passing into this diversion channel has been, and will be, greatly increased.

The Flood Control Act provides for the construction of guide or protection levees running in a southerly direction to be built on either side of the floodway which will direct the water into a specified channel. These guide levees have not been constructed, but their construction will serve only to protect other areas from inundation and will only intensify the inundation of plaintiff's property which lies between said proposed guide levees.

The maximum previous overflow of water into the Boeuf Basin occurred in 1927 and was estimated at 450,000 cubic feet per second in times of extraordinary flood. Said Flood Control Act involves an intentional, additional, occasional flooding, damaging and destroying of plaintiff's property as the direct consequence of the construction of the entire project (Jadwin Plan) by the Government to relieve the channel of the River in times of high water, all of which was contemplated by the Congress when enacting said Flood Control Act, and constitutes a taking of plaintiff's private property for public use for which the Government of the United States is liable to the plaintiff, as upon an implied contract, for which compensation as might have been awarded plaintiff had condemnation proceedings been instituted by the Government of the United States.

#### IV:

Said Flood Control Act provided that a Board to consist of the Chief of Engineers, the President of the Mississippi River Commission, and a civil engineer, chosen from civil life, be appointed by the President of the United States, by and with the consent and advice of the Senate, which Board was authorized and directed to consider the engineering differences between the adopted project (Jadwin Plan) and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and to recommend to the President such action as such Board might deem necessary to be taken in respect to such engineering differences, and it was provided further that the decision of the President upon all recommendations or questions submitted to him by such Board should be followed in carrying out the project adopted. There were very substantial differences in the plan of the Mississippi River Commission for the Boeuf River Floodway diversion as it affected



the plaintiff's property, and the plan of the Army Engineers (Jadwin Plan), so that the plaintiffs could not know just how his property was to be effected until those engineering differences were adjusted and settled.

Said Special Board created by Section 1 of said Flood Control Act reported to the President of the United States on August 8, 1928, recommending the engineering of the Jadwin Plan (the adopted project), and on August 13, 1928, the President of the United States approved "the policy and method of dealing with the problem set out in the report, dated August 8, 1928," of said Special Board, and the Jadwin Plan thereby, on August 13, 1928, for the first time became definite, certain and fixed as a matter of law, insofar as it affects the plaintiff's property herein involved. Work on the project by the United States Government began immediately on August 13, 1928, funds for the purpose being available, and construction work on this plan of flood control is now approximately 70% complete, and plaintiff's property has thus been taken.

#### V.

The project of flood control as adopted by the Flood Control Act of May 15, 1928, for which the Government of the United States assumed responsibility, differed from the old flood control system of levees, and levees only, by the deliberate creation of certain diversion channels to be sacrificed for the protection of the balance of the alluvial valley of the Mississippi River. The then Chief of Engineers, in his report to the Secretary of War, which was submitted by the Secretary of War to the Congress in connection with the Jadwin Plan, which was enacted into law by said Flood Control Act, states that:

"The recommended plan (Jadwin Plan) fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity, and sends the surplus water through lateral floodways. Its essential features and their functions are:

8 "Floodways from Cairo to New Madrid, from the Arkansas River through the Tensas Basin to the Red River, and from the Red through the Atchafalaya Basin to the Gulf of Mexico. These will relieve the main channel of the water it can not carry and lower the floods to stages at which the levees can carry them." (Document No. 90, House of Representatives, 70th Congress, 1st Session pp. 34).

"The Jadwin Plan, as enacted into law by said Flood Control Act, further describes the plan for flood control as it

affects the plaintiff's property, which is protected only by the "fuse-plug" or "safety-plug" section of the Levee immediately below the mouth of Cypress Creek in Desha County, Arkansas, as follows:

"16. From the mouth of the Arkansas (River) to the Old River, at the mouth of the Red (River), extreme floods can not be carried between levees of the Mississippi (River) without dangerous increase in their heights. A floodway for excess floods is provided down the Boeuf River, on the west side of the river. Excess water can not be carried through the section on the east side, since it would be forced back into the main river by the highlands on the east bank below Vicksburg and have to be carried thence for 160 miles between the main river levees to the mouth of the Red River. The entrance to the flood-way is closed by a safety-plug section of the levee, at present grade, which is located at Cypress Creek near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi (River), from the Arkansas to the Red, will be raised about 3 feet. To prevent flood waters from entering the Tensas Basin, except into the floodway during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary.

"17. The Section at the head of the floodway will protect the land within the floodway levees against any flood up to one of the magnitude of the 1922 flood. A flood of the  
9 magnitude somewhere between that of 1922 and of 1927 will break it, turning the excess water down the floodway, which will carry it safely to the backwater area at the mouth of the Red River." (Parentheses ours). (Document No. 90, p. 6).

Said Jadwin Plan, enacted into law by said Flood Control Act, further recites, and the plaintiff alleges:

"The confinement of flood flows by levees has substantially raised the flood heights." (Document No. 90, p. 19).

"96. The confinement of the Mississippi River within levees and the great development of drainage systems in recent years have raised flood stages materially and this raising has exceeded estimates made in the past. Were it attempted to hold the water within the present levee lines by raising them, river stages are possible as much as • • • 14 feet above the present levee grade at Arkansas City, • • • The levees now have an average height of about 18 feet. The principal means to meet this situation is to spill the water

out of the main leveed channel at selected points when the stages reach the danger point.

"97. The water within the river channel does no damage whatever and it should be kept within the channel as long as possible. The excess must be spilled through safety valves when the volume exceeds the safe capacity of the river. These safety valves consist of one controlled spillway, several relief or fuse-plug levees at present grade and one levee of reduced height, all emptying into natural floodways wholly or partially leveed." (Document No. 90, p. 23).

"The levees generally will be raised about 3 feet, so that the selected, weaker relief levees will be at about the elevation of the present levee top and will surely serve their purpose." (Document No. 90, p. 24).

"118. To insure that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress Creek must be kept at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River Bottom, where natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be enclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees." (Document No. 90, p. 28).

These side levees, or guide levees, have not yet become constructed by the Government; but plaintiff's property is in the floodway whether said floodway be controlled or uncontrolled as at the present, and is subject to inundation and destruction whenever the fuse-plug levee gives way to protect the balance of the alluvial valley of the Mississippi River.

"Due to an increase in flood height by reason of levee construction and drainage, it has been estimated that a stage over the present top at Cypress Creek might occur in the long run about once in twelve years." (Document No. 90, p. 28).

"121. The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible floods." (House Document No. 90, p. 28)..

"The draw down from Cypress Creek relief levee into the Boeuf River diversion below makes it possible to protect the lower part of this section of the river from superfloods without excessive levee raising. . . . the average amount that levees are to be raised throughout is approximately  $3\frac{1}{2}$  feet above the present adopted grade." (Document No. 90, pp. 29-30).

11 "The plan proposes the strengthening of the levees on the south side of the Arkansas and Red Rivers and raising them about 3 feet, as far upstream as is necessary for that purpose." (Document No. 90, p. 30).

## VI.

Section 4 of said Flood Control Act provides:

"Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River . . . ."

The waters that will flow into the Boeuf Floodway or diversion channel will all be diverted from the main channel of the Mississippi River at a place and in a manner which has never been true before, but which subjects the plaintiff's property to inundation, damage and destruction whenever a flood stage is reached in the Mississippi River sufficient to overtop or wash away the fuse-plug levee hereinbefore mentioned. The main levees of the Mississippi River have been strengthened and raised so as to now insure the flooding of the plaintiff's property at predetermined stages of the River. The purpose of leaving the fuse-plug levee hereinbefore mentioned (plaintiff's only protection) is solely for the purpose of having the water break over same at flood tide and flood this diversion channel or floodway in which plaintiff's property is situated. It is an uncontrolled spillway. There is no provision of law for rebuilding the fuse-plug levee when it washes out, but plaintiff's property will then be left free to the ravages of the escaping waters of the Mississippi River with no protection whatever.

Pursuant to the provisions of said Flood Control Act, from Helena South the levees on the west bank of the Mississippi River will be maintained at sufficient height to hold all of the flood waters which reach this point from the entire basin of the upper Mississippi River and all of its tributaries, carrying all of this water within the levees to a point about 12 miles distant from a similar levee on the South bank of the



12 Arkansas River. Through this gap the White River passes into the Mississippi River about midway between the lower end of the levee on the west bank of the Mississippi River above mentioned, and the mouth of the Arkansas River. Lying between these levee ends to the north and west of the 12 mile gap, is located a pool or basin of backwater some twelve hundred square miles in area into which will be poured all of the waters of the White River and its watershed, as well as the overflow on the north bank of the Arkansas River for a distance upstream to the locality of Pine Bluff, Arkansas.

It is not contemplated under the present law that any levee will be built along this stretch of the River. When this basin of twelve hundred square miles is filled, its outlet, together with all water coming down the White and Arkansas Rivers, will be discharged through the 12 mile gap above described.

This combined volume will be added to that in the main stream of the Mississippi River, consisting both of its own water brought down in its own channel from Cairo, Illinois, and also the quantity of water which will have been returned into the Mississippi River, under the present law, from the St. Francis River Basin north of Helena; then for a few miles the comparatively narrow channel of the main levees of the Mississippi River will carry this enormous volume of concentrated flood water until it reaches, and is hurled against, the fuse-plug levee at the head of the Boeuf River Basin hereinbefore referred to, a comparatively short distance from the plaintiff's property. The "fuse-plug" levee is so named because in due course during flood stages of the Mississippi River this stretch of the levee will break and be washed out when the river reaches the predetermined height fixed by the Army Engineers, in similar fashion to what happens when a current of electricity attains a designed voltage sufficient to blow out the fuse in electrical machinery. It is contemplated that this concentration of flood water upon the fuse-plug will overtop the fuse-plug levee and  
13 cause a crevasse through the fuse-plug levee which will gradually widen to include the whole of twenty or more miles of said relief levee if the condition of the Mississippi River so requires for the safety of the remainder of its alluvial valley.

The causes of damage to plaintiff's land and property, and the physical conditions involved in this litigation resulting in such damage, are identical to those involved and recited in the decision in the case of Patrick J. Hurley vs. F. Foster Kincaid Sr., 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637, more

particularly described in the opinions of the courts in the same case below reported at 49 F. (2d) 768, affirmed 37 (2d) 602, except that the plaintiff's land is located at the very head of the floodway, a comparatively few miles distant from the fuse-plug levee, its only protection. When the fuse-plug levee breaks the plaintiff's property will be subjected to the immediate, destructive onrush of water, with little or no opportunity to rescue even movable property after the break.

## VII.

Prior to the adoption of the Flood Control Act, the plaintiff, and other property owners now protected only by said fuse-plug levee, had and exercised their legal right of protecting themselves against inundation by raising the present fuse-plug levee during flood times. This right of self-defense has been taken from the plaintiffs, and the owners of property similarly situated, by the Flood Control Act.

Paragraph numbered 120 of the adopted project provides as the key to the entire system of flood control that:

"The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height." (Document No. 90, p. 28).

Paragraph numbered 118 of the adopted project further provides that:

14 "To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz. 3 feet below the new levee grade."

## VIII.

Petitioner further relies upon the provision of Section 3 of said Flood Control Act which provides: "... if in carrying out the purpose of this act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified, or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the River are subjected to overflow and damage which are not now overflowed or damaged, by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceeding on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

Your petitioners allege that the levees on the opposite banks of the river from their property have been constructed and raised as hereinbefore described and as directed by law, so that their property is now subject to overflow and damage by the break of the fuse-plug levee within the meaning of this Section of said Flood Control Act, again constituting a taking of their property for which they are entitled to just compensation under the provisions of the Act, as well as under the Fifth Amendment to the Constitution of the United States.

Your petitioners further allege that by the express provision of Section 2 of said Flood Control Act "no local contribution to the project herein adopted is provided." Prior to the adoption of said Flood Control Act, the plaintiff enjoyed equal protection against flood menace, without discrimination, but the primary purpose of the said Flood Control Act is to protect the balance of the alluvial valley of the

15 Mississippi River by sacrificing the plaintiff's property and the property of others within the Boeuf River floodway similarly situated. Unless, therefore, plaintiff are compensated for all damages by them sustained as herein alleged, then the plaintiff will be forced to contribute their entire damages to the project, notwithstanding said provision of the Act to the contrary.

#### IX.

Plaintiffs plead and allege that they own the following described lands which are located within the area of the Boeuf River Floodway created by said Flood Control Act as hereinbefore described, the plaintiff's lands and property being described as follows, to-wit:

Southwest quarter of the Southwest quarter (SW $\frac{1}{4}$  SW $\frac{1}{4}$ ) of Section Thirty one (Sec. 31) in Township Twelve (12) South, Range One (1), West, in Desha County, Arkansas.

The fair market value of said lands and property before their taking and dedication by said Flood Control Act for public use as a flood way was \$5,000.00. The fair market value of said lands after their subjection to the servitude of said floodway was reduced to \$1,000.00. Plaintiffs have been damaged in the sum of \$4,000.00 by reason of the taking of their property for public use as a floodway as aforesaid.

Since the Government of the United States has assumed control of the flood water of the Mississippi River by the passage of said Flood Control Act and has intentionally dedicated the plaintiff's property as a floodway to be used



as aforesaid, plaintiff's property has been subject to flood menace at any and all times. The crops of any year may be washed away, and the uncertainty of the safety of said property makes it unwise to undertake to use said property at any time. Its usefulness, enjoyment and value has been practically destroyed.

## X.

16 The adopted project has had the effect of casting a cloud on the title of the plaintiff to their said land and property, and has destroyed its salable value, and has impaired and practically destroyed their use and enjoyment of same. The result of setting apart this area as a floodway or diversion channel, and of preventing the escape of the flood water of the Mississippi River elsewhere, has so destroyed the usefulness and value of plaintiff's property that they are now unable to borrow money on said property, or to sell or dispose of same, or to interest persons in operating said lands for farms, or for any other purpose, due to the fact that the Government of the United States has substantially taken possession of the property for a diversion channel or floodway of the Mississippi River.

Plaintiff further pleads that notwithstanding the fact that the Fifth Amendment of the Constitution of the United States provides: " . . . nor shall any person . . . be deprived . . . of property without due process of law, nor shall private property be taken for public use without just compensation," and notwithstanding the provision of the Flood Control Act that the "United States shall provide flowage rights for additional destructive flood water that will pass by reason of diversion from the main channel of the Mississippi River," and notwithstanding the further provision of said Act that: "The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights of way which, in the opinion of the Secretary of War, and the Chief of Engineers, are needed in carrying out this project, and said proceedings to be instituted in the United States District Court for the district in which the land, easement or right of way is located," no condemnation proceeding has been commenced against the plaintiff for his property, and no compensation has been paid him or offered him.

## XI.

Prior to the passage of said Flood Control Act, in order to secure protection of his property against the flood water of the Mississippi River, the plaintiff paid large sums of

money each year in the form of levee tax against their property for the purpose of enabling the Southeast Arkansas Levee District, which includes the plaintiff's property, to build levees along the river front of the Mississippi River. And in order to construct such levees, the said Southeast Arkansas Levee District, a quasi-municipal corporation created by the General Assembly of the State of Arkansas, issued bonds in a large amount to repay which the General Assembly of the State of Arkansas imposed an annual tax of 30c an acre on plaintiff's property. The Government of the United States has now taken from the Southeast Arkansas Levee District and the plaintiffs the right to defend the plaintiffs' property against the ravages of flood, and the plaintiffs have thereby completely lost their investment in the past, and the pledges of their property in the future to which plaintiffs submitted only in reliance upon their right to protect their property against floods. The Government of the United States has now dedicated the plaintiffs' property, and all others in the Boeuf River Floodway, as a floodway, but has not relieved the plaintiff's property of the amount of bonded indebtedness placed on plaintiffs' property for flood protection as aforesaid.

This is one of the elements of value which has been taken by the Government of the United States for which no compensation has been made.

## XII.

Furthermore, when the mouth of Cypress Creek was closed by levees, in order to prevent the plaintiffs' property, and other property similarly situated in the Boeuf River Floodway, from being destroyed, the plaintiffs' property became incorporated into the Cypress Creek Drainage District by Act of the General Assembly of the State of Arkansas. And in order to secure protection against flood menace, and in order to properly drain the lands from surface water which had been diverted over the plaintiffs' property by the closing of the mouth of Cypress Creek, the plaintiffs permitted his lands to become bonded to the extent of \$20.00 per acre in the form of benefits assessed against said property by the Cypress Creek Drainage District, which benefits were in turn pledged by the Cypress Creek Drainage District for the payment of an enormous issue of bonds by the District.

The present project by the United States Government has rendered this drainage system without value to the plaintiffs' property, and has destroyed the benefits assessed against their property, and is one of the elements which has

been taken and destroyed by the Government of the United States without just compensation.

### XIII.

Wherefore, the premises considered, plaintiffs pray judgment against the Government of the United States in the sum of Four Thousand [Dollars] (\$4,000), together with interest and costs thereon, and for all other and further general relief to which the premises and proof may show the plaintiffs entitled.

**MRS. JULIA CAROLINE SPONEN-  
BARGER, Plaintiff,**

By Lamar Williamson and  
E. E. Hopson, Attorneys.

19

Verification.

State of Arkansas,

County of Desha—ss.

I, Mrs. Julia Caroline Sponenbarger, the claimants, state on oath that said claimant is the owner of the property in the foregoing complaint; and that there has been no assignment or transfer of said claim or any part thereof, or interest therein, except as stated in the Petition; and that said claimants are justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets; and that the claimant are citizens of the United States and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; and that the affiant and claimant believes the facts stated in said petition to be true.

In testimony of all of which said affiants have hereunto set their hand and seal on this 10th day of August, A. D., 1934.

**MRS. JULIA CAROLINE SPONEN-  
BARGER, Affiant.**

Subscribed and sworn to before the undersigned duly commissioned, qualified and acting Notary Public in and for said County and State on this 10th day of August, A. D., 1934.

**BESSIE DUNN,  
Notary Public.**

(Seal)

My commission expires: February 28, 1937.

Endorsed: "Filed Aug. 11, 1934. Sid B. Redding, Clerk."

20

(Demurrer of Defendant to Petition.)

Comes the United States of America, defendant herein, by Fred A. Isgrig, United States Attorney for the Eastern District of Arkansas, and demurs to the complaint of the plaintiff herein, and for cause states:

That the petition of the plaintiff does not state a cause of action against the defendant within the jurisdiction of this Court under Section 24, Paragraph 20, of the Judicial Code, U. S. C., Title 28, Section 41, Sub-division 20, in that the allegations do not show a taking of plaintiff's property.

Wherefore, defendant prays that the suit of the petitioner herein be dismissed, and for all other just and proper relief.

FRED A. ISGRIG,  
United States Attorney for the  
Eastern District of Arkansas.

Endorsed: "Filed Sept. 28, 1934, Sid B. Redding, Clerk."

21 (Stipulation for Transfer of Cause from Eastern Division to Western Division of Eastern District of Arkansas.)

In the United States District Court, Eastern Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Petitioner,  
No. 892. vs.  
United States of America, Defendant.

The plaintiff and defendant, by their respective attorneys of record, hereby agree and stipulate that the above styled cause shall be transferred to the United States District Court for the Western Division of the Eastern District of Arkansas, sitting at Little Rock, Arkansas, for trial and final decree, pursuant to the authority of Section 119 United States Code Annotated (Judicial Code Sec. 58; Title 28, United States Code Annotated, Sec. 119); and pray the court to so order.

Respectfully submitted,

MRS. JULIA CAROLINE SPONEN-  
BARGER, Petitioner,  
By Lamar Williamson, Attorney.

UNITED STATES OF AMERICA,  
 Defendant,  
 By Fred A. Isgrig,  
 United States Attorney for the Eastern  
 District of Arkansas.

Endorsed: "Filed Oct. 12, 1934, Sid B. Redding, Clerk."

22 (Order Overruling Demurrer to Petition.)

In the District Court of the United States for the Eastern District of Arkansas, Western Division.

Mrs. Julia Caroline Sponenbarger, Petitioner,  
 No. 7984. vs.  
 United States of America, Defendant.

Now on this day is presented to the court the demurrer of the United States of America pleading that the petition of the plaintiff does not state a cause of action against the defendant within the jurisdiction of this court, in that the allegations do not show a taking of plaintiff's property; and after hearing argument of counsel for both parties, the court being well and fully advised in the premises, doth find that the demurrer should be overruled.

It Is, Therefore, By The Court Considered, Ordered And Adjudged that the defendant's demurrer be and the same is hereby overruled and denied, to which ruling of the court the defendant excepts and asks that its exceptions be noted of record which is hereby ordered; and the defendant is given sixty days from this date within which to file answer to plaintiff's petition.

Done and ordered of record this 23rd day of November, 1934.

JOHN E. MARTINEAU, Judge.

Endorsed: "Filed Nov. 24, 1934, Sid B. Redding, Clerk."

23 Answers.

Comes the defendant, the United States of America, by Fred A. Isgrig, United States Attorney for the Eastern District of Arkansas, and files herewith its answer.

The defendant admits that the plaintiff is a citizen of the State of Arkansas, that her petition in suit is of a civil nature.

The defendant admits that the United States of America, under what is known as the Flood Control Act of Congress,



adopted a project for the flood control of the Mississippi River.

The defendant denies that the volume of water passing into the so-called diversion channel has been and will be greatly increased by the plan adopted, and denies that fuse-plug levees have been constructed, and denies their construction will tend to intensify and increase the inundation of plaintiff's property.

Defendant denies that under the contemplated plan of flood control that it will cause an intentional additional flooding or cause additional damage or destruction of plaintiff's property, and denies that a direct consequence of the construction of the entire project by the Government constitutes a taking of plaintiff's private property for public use.

Defendant denies that water which will flood into the proposed floodway or diversion channel will be diverted from the main channel of the Mississippi River in a manner and place which has not heretofore been true, and denies that this subject plaintiff's property to destruction  
24 whenever a flood stage is reached in the Mississippi River, or will increase in any way the hazard or danger of high water or flood upon the land of this plaintiff.

Defendant denies that the lands of the plaintiff in question are left without any protection whatever, but alleges that it has the same protection which it has heretofore had with reference to the levee and that it has the further protection in other improvements and changes in the channel in that in case of high flood a less amount of water will flow over plaintiff's land [then] did flow over it during the flood of 1927.

Defendant admits that prior to the adoption of the Flood Control Act that plaintiff and other property owners had exercised their legal rights in protecting themselves against inundation by raising the levee during flood times. Defendant specifically denies that this right of strengthening this levee has been taken from the plaintiff, and specifically denies that this right of self defense has been taken from the plaintiff.

Defendant specifically denies that the plaintiff in this case is entitled to damages because of the failure of the Government or the defendant to increase the heights of the levees which have heretofore protected the property at this point, and specifically denies that because the Government has strengthened the levees at other points that this gives rise to any just cause of complaint or legal action or claim for

damages against the defendant, the United States Government.

The defendant denies that the flood control plan or the improvement upon the Mississippi River has in any way affected the market value of plaintiff's land, and denies that the plaintiff has been damaged by this manner or means in any sum whatsoever and specifically denies that the plaintiff has been damaged in the sum of Four Thousand  
25 Dollars (\$4,000.00), or in any other sum whatever, and specifically denies that the act of the Government in this case amounts to the taking of the plaintiff's land or property for public use as a flood-way or for any other purpose.

Defendant specifically denies that the property of the plaintiff has been subjected to any increased menace from flood than that which ordinarily existed at all times, denies that the crops of any year are any more apt to be washed away, and denies that the uncertainty of the safety of said property makes it unwise to undertake to use the property at any time, denies that its usefulness has been practically destroyed.

Defendant denies that the attempted project has cast a cloud on the title of the plaintiff to her said land and property, denies that it has practically destroyed the sale value of the land, and denies it has ~~practically~~ destroyed her use and enjoyment of same.

Defendant denies that as a result of said plan that the property, its usefulness and value has been destroyed, and denies that as a result of this act that plaintiff is unable to borrow money on said property, and denies that as a consequence of said act she is unable to sell or dispose of same or to interest persons in the operation of said land for a farm or any other purpose, and denies that this condition as it exists is equivalent to the Government substantially taking possession of plaintiff's property for a flood channel or diversion of the Mississippi River, and specifically denies that the Government of the United States, the defendant herein, has taken possession of the property in any manner whatever.

Defendant admits that prior to the passage of the Flood Control Act that the plaintiff was taxed for the purpose of enabling the Southeast Arkansas Levee District to build levees along the front of the Mississippi River. Defendant imposed not the amount of the tax and is not advised  
26 whether the plaintiff paid large sums of money each year in the form of a levee tax, and therefore asks that the plaintiff be required to make such proof.



The defendant herein, the United States of America, denies that it has taken from plaintiff the right to defend plaintiff's property from the loss of flood, and denies that plaintiff has completely lost the investment in the past and the privileges of her property in the future.

The defendant knows not whether the property of the plaintiff is incorporated in the Cypress Drainage District and requests that strict proof be supplied thereto and as to the amount of taxes, but the defendant, the United States of America, specifically denies that the present project of the United States Government has rendered this drainage system without value to the plaintiff's property and has destroyed the benefits assessed against this property and is one of the elements that has been taken and destroyed by the Government of the United States, and specifically denies that the Government has in any way [interfered] with the right of the plaintiff to protect herself from floods, and specifically denies that any act of the Government has amounted to a taking or a confiscation of the lands of the plaintiff, and denies that the United States Government, the defendant herein, has taken the lands of the plaintiff as contemplated and provided for in the statutes.

Wherefore, having fully answered, the defendant prays that the suit of the plaintiff be dismissed, that the defendant be dismissed with its costs herein expended, and for all other just and proper relief which the premises and proof may show the defendant is entitled.

FRED A. ISGRIG,  
United States Attorney for the  
Eastern District of Arkansas.

Endorsed: "Filed May 14, 1935, Sid B. Redding, Clerk."

27 (Motion of Defendant to Make Additional Parties  
Plaintiffs.)

In the United States District Court, Eastern District of Arkansas, Western Division.

Mrs. Julia Caroline Spokenbarger, Plaintiff,  
No. 7984. vs. At Law.

The United States of America, Defendant.

Comes now the United States of America, the defendant herein, through and by its attorneys of record, and petitions the Court in the manner following, to-wit:

I.

That heretofore and on the 11th day of August, 1934, the plaintiff herein filed in the District Court of the United

States for the Eastern District of Arkansas, Eastern Division, her cause of action before said Court, under the provisions of the statutes of the United States, for the purpose of asserting a claim not sounding in tort against the United States, and that the said petitioner, as plaintiff, filed said cause of action individually. Said cause of action was transferred from the Eastern Division to the Western Division of the Eastern District of Arkansas on October 15, 1934.

## II.

Your petitioner further states that for a proper and complete adjudication of the issues therein involved as set out in plaintiff's petition it is necessary to cause other persons and corporations to be joined therein as each and all of said corporations and individuals as hereinafter stated allege some lien or claim against said premises described in said petition and alleged by said plaintiff to be her property. That such corporations and individuals and their interests therein are as follows, to-wit:

28 That said petition in paragraph I on page 13 thereof alleges that the premises described are within the territory embraced within the Southeast Arkansas Levee District, a quasi-municipal corporation created by the General Assembly of the State of Arkansas, and which said corporation has issued bonds for the payment of which the said plaintiff is compelled to contribute her pro rata share by and through the process of taxation. That the said Southeast Arkansas Levee District was duly organized and incorporated under and by virtue of the laws of the State of Arkansas for all acts and purposes defined by Act No. 83 of the Acts of the General Assembly of the State of Arkansas for the year 1917, to which reference is particularly made.

That the Mercantile-Commerce Bank and Trust Company is a banking corporation with powers of trust attached, organized under the laws of the State of Missouri, and was at the times hereinafter mentioned. That the said bank and trust company did on the 5th day of February, 1932, file its complaint as a bill in equity against the Southeast Arkansas Levee District wherein it, the said Mercantile-Commerce Bank and Trust Company alleged that they were trustees authorized under their power of trust to act as trustees in behalf of the holders of certain bonds theretofore issued by the Southeast Arkansas Levee District for the payment of which the said Southeast Arkansas Levee District had defaulted.

That thereafter and on the 6th day of February, 1932, one Grady Miller, Esq., was appointed receiver by the United States District Court for the Eastern District of Arkansas, Western Division, upon the aforesaid application of the said Mercantile-Commerce National [Bank] and Trust Company and the Mercantile Commerce National Bank of St. Louis.

29 That the St. Louis Union Trust Company and Franklin-American Trust Company were at the times hereinafter mentioned duly organized banking and trust companies under the laws of the State of Missouri with such powers as are conferred upon such institutions by said Missouri statutes. That the Cypress Creek Drainage District is a quasi-municipal corporation duly created by Act No. 110 of the General Assembly of the State of Arkansas for the year 1911, and as amended by subsequent acts, for all acts and purposes defined in said Act No. 110 and as amended by subsequent acts relative thereto. That the St. Louis Union Trust Company and Franklin-American Trust Company were trustees under a certain deed of trust or indenture for the security of certain bonds theretofore lawfully issued by said Cypress Creek Drainage District and recorded in the office of the Recorder of Deeds of Desha County, Arkansas, (and other Counties within said Commonwealth) on the 10th day of May, 1916, and recorded in Record Book No. 30 at page 286, to which reference is made. That thereafter and on the 31st day of December, 1929, the said St. Louis Union Trust Company and Franklin-American Trust Company, as plaintiffs, filed its bill in equity in the United States District Court for the Eastern District of Arkansas, Western Division, for receiver to take charge of the affairs of said defendant District, collect its taxes and apply them to the payment of delinquent bonds and coupons, and that thereafter and prior to the filing of plaintiff's petition herein the United States District Court for the Eastern District of Arkansas, Western Division, duly appointed Alex H. Rowell, of Pine Bluff, Arkansas, and William R. Humphrey, of St. Louis, Missouri, as receivers for the Cypress Creek Drainage District, and that the said Alex H. Rowell and William R. Humphrey are now active in such capacity under the appointment as aforesaid.

That after the appointment of said receivers for the Cypress Creek Drainage District and the Southeast Arkansas Levee District various and sundry parties, firms, corporation, acting in the capacity of bondholders' committees and trustees for disclosed bondholders did intervene for and on behalf of said named bondholders who were then owners

and possessors of various bond issues which had been law-  
fully theretofore issued by the Levee and Drainage  
30 Districts heretofore named. That the aforesaid in-  
terests are interested in the outcome of the litigation  
heretofore brought by the said Mrs. Julia Caroline Sponen-  
barger for the reason that the land which she claims to own  
and which is described in said petition is within the various  
and sundry limits and boundaries of both the Levee and  
Drainage Districts and to the extent of the benefits assessed  
against her premises and for the payment thereof the said  
corporations, receivers, bondholders' committees, etc., have  
some interest, the extent of which your petitioner is unable  
to state, in the outcome of said litigation.

Your petitioner further states that said Levee and Drain-  
age Districts, through and by their authorized representa-  
tives, have asserted their claims by filing suits in the Court  
of Claims alleging certain overt acts on the part of the  
United States in the alleged destruction of their securities.  
Your petitioner further advises this Court that on the 11th  
day of September, 1935, the Cypress Creek Drainage District  
in Desha and other Counties in Arkansas filed its petition in  
bankruptcy under the amended Bankruptcy Act for the pur-  
pose of re-organization and suggesting to the Court a plan  
of re-adjustment, and which said action is now pending in  
said Court. That for the purpose of a full and complete ad-  
judication of the interests of all persons concerned and to  
prevent the multiplicity of pending actions as well as the  
multiplicity of actions that might yet be filed by said persons  
representing the foregoing Levee and Drainage Districts,  
your petitioner respectfully prays that the following persons  
may be required to appear in said action as follows, to-wit:  
Grady Miller, as receiver for the Southeast Arkansas Levee  
District, in his official capacity; Alex H. Rowell and William  
R. Humphrey, receivers of the Cypress Creek Drainage Dis-  
trict, in their representative capacity; The Mercantile-  
Commerce Bank and Trust Company and the Mercantile-  
Commerce National Bank of St. Louis, as trustees for cer-  
tain disclosed and undisclosed bondholders; The St. Louis  
Union Trust Company and Franklin-American Trust Com-  
pany, in their individual and representative capacity, wheth-  
er owners of bonds or as trustees for undisclosed bondhold-  
ers; also such bondholders' committees as have heretofore  
interpleaded in said receivership proceedings the names of  
which your petitioner is now unable to advise the  
31 Court but which petitioner alleges can be ascertained  
by consulting the files of the United States District  
Clerk at Little Rock, Arkansas; that all the interests, rights,



claims and prerogatives of each and every person, firm, or corporation be adjudicated and that each, as aforesaid, shall have its day in Court, and that when this cause is finally determined all rights as affecting these individuals shall be forever foreclosed; and that your petitioner further respectfully prays that an order be entered requiring the foregoing to be joined as plaintiffs in said action and for such other and further relief as to the Court may seem just and proper.

FRED A. ISGRIG,  
United States Attorney for the  
Eastern District of Arkansas.

Endorsed: "Filed April 20, 1936. Sid B. Redding, Clerk."

32 (Order Sustaining Motion of Defendant to Make Additional Parties Plaintiffs, and Sustaining in Part and Overruling in Part of Defendant's Motion to Strike out Portions of Petition.)

In the United States District Court for the Western Division  
of the Eastern Judicial District of Arkansas.

Mrs. Julia Caroline Spokenbarger, Petitioner,  
No. 7984. vs.

The United States of America, Defendant.

Ruling of the Court on Defendant's Motions

- (1) To Make Parties Plaintiff, and,
- (2) To Strike Parts of Plaintiff's Petition.

I.

Defendant's motion to make additional parties plaintiff sustained for the reasons stated in said motion.

II.

Defendant's motion to strike out parts of plaintiff's petition overruled as to 1, 2, 3, 4, 5 (Second), 7, 10, 11, 12, 13, 14, 15 and 17 specifications; and, sustained as to 5 (First), 6, 8, 9 and 16 specifications.

CHAS. B. DAVIS,  
United States District Judge.

Endorsed: "(Filed September 26, 1936.) Sid B. Redding, Clerk."

33 (Protest of Plaintiff to Order of Court Sustaining Motion of Defendant to Make Additional Parties Plaintiff.)

In the United States District Court, Western Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Plaintiff,  
No. 7984. vs.  
United States of America, Defendant.

Assignment of Error.

Re: Additional Parties.

Comes the plaintiff, Mrs. Julia Caroline Sponenbarger, protesting the Order of the Court which sustains the defendant's motion to make additional parties plaintiff in this action, and protests that said rule of the Court is erroneous, and against the just right of this plaintiff, for the following reasons:

I.

The plaintiff's alleged cause of action is strictly personal. The cause of action is not in rem, and does not deal with a tract of land. (See Boston Chamber of Commerce vs. City of Boston, 217 U. S. 189, 54 L. Ed. 725, 727.)

II.

The plaintiff has the legal right to state her own cause of action, and the cause of action is only that which is stated in the plaintiff's complaint.

III.

The plaintiff has the right to control her own alleged cause of action, without interference by those made parties by Order of the Court or any other persons or parties.

IV.

If either of the other parties brought into the case by Order of the Court have a cause of action against the defendant, such cause of action is a distinct cause of action, based upon a distinct and different interest, if any, in the land involved, and involves damages which are entirely separate and distinct from the damage which has been sustained by the plaintiff. Entirely different rules for the measure of damages

would be involved on the part of such new parties, in which the plaintiff has no interest, and would lead to interminable complexity and confusion, entirely destroying the control of the plaintiff over her own cause of action.



## V.

The bringing in of the additional parties plaintiff ordered by the Court would involve so many new issues as to make the expense of trial beyond the ability of the plaintiff to discharge, and would unfairly deprive the plaintiff of her right to try the simple issue existing between herself and the defendant at a reasonable cost, amounting to a substantial denial of justice to the plaintiff.

## VI.

The plaintiff has paid and discharged all liens and assessments against her property due Grady Miller as Receiver of the Southeast Arkansas Levee District, in his official capacity; and therefore Grady Miller, as Receiver of the Southeast Arkansas Levee District has sustained no damage because of the plaintiff's cause of action, and is therefore not a proper party plaintiff in this action.

## VII.

The plaintiff has paid and discharged all liens and assessments against her property due Alex H. Rowell and William R. Humphrey as Receivers of the Cypress Creek Drainage District, in their representative capacities; and therefore Alex H. Rowell and William R. Humphrey as Receivers of the Cypress Creek Drainage District have sustained no damage because of the plaintiff's cause of action, and are therefore not proper parties plaintiff in this action.

## VIII.

The plaintiff has paid and discharged all liens and assessments against her property due the Mercantile-Commerce Bank and Trust Company and the Mercantile-Commerce National Bank of St. Louis, as Trustees for certain disclosed and undisclosed bondholders; and therefore the Mercantile-Commerce Bank and Trust Company and the Mercantile-Commerce National Bank of St. Louis, as Trustees for certain disclosed and undisclosed bondholders have sustained no damage because of the plaintiff's cause of action, and are therefore not proper parties plaintiff in this action.

## IX.

35 The plaintiff has paid and discharged all liens and assessments against her property due The St. Louis Union Trust Company and Franklin-American Trust Company, in their individual and representative capacities, whether owners of bonds or as Trustees for undisclosed bondholders; and therefore the St. Louis Union Trust Company

and Franklin-American Trust Company, whether owners of bonds or as Trustees for undisclosed bondholders have sustained no damage because of the plaintiff's cause of action, and are therefore not proper parties plaintiff in this action.

X.

The plaintiff knows of no bondholder's committee which has any legal entity, or the capacity or authority to sue or be sued or to interplead in this action, or who have any interest or legal right of any kind or character in the plaintiff's cause of action.

Wherefore, the premises considered, the plaintiff prays that the Order of the Court naming additional parties plaintiff be rescinded, cancelled and annulled; and that the plaintiff be allowed to proceed with the trial of her own cause of action against the defendant as stated in her original cause.

The plaintiff stands upon her objection, and this Assignment of Error, throughout the further progress of the case and saves her exception to each and every rule of the Court to the contrary.

Respectfully submitted,

MRS. JULIA CAROLINE SPONEN-  
BARGER, Plaintiff.

By Lamar Williamson, As her Attorney.

Endorsed: "Filed Oct. 6, 1936, Sid B. Redding, Clerk."

36 (Appearance and Protest of Grady Miller, as Receiver for Southeast Arkansas Levee District, to Order making him a party Plaintiff).

In the United States District Court, Western Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Plaintiff,  
No. 7984 vs.

United States of America, Defendant.

Comes Grady Miller, the duly appointed, qualified and acting Receiver of and for the Southeast Arkansas Levee District, and, pursuant to the Order of this Court filed in the above styled cause September 26, 1936, enters his appearance in this action and submits to the jurisdiction of the Court therein, but under protest, and noting his objections of record, and for cause states:

I.

He, your respondent, elected to prosecute his claim for damages against the United States Government resulting

from the construction work done by the United States under the provisions of the Flood Control Act of May 15, 1928, referred to in the plaintiff's complaint, by his separate action. Therefore, on August 10, 1934, your respondent filed his separate action against the United States in the Court of Claims of the United States of America under the style of "Southeast Arkansas Levee District, a corporation and H. Grady Miller as Receiver thereof, vs. the United States of America, No. 42718," which suit is still pending. Therefore, jurisdiction of the interest of your respondent in the subject matter of the above styled action first attached in the Court of Claims of the United States of America, which Court still controls your respondent's cause of action.

## II.

Your respondent prefers to prosecute his own separate and distinct claim for damages against the United States in his own way, and in his own separate action.

37

## III.

The claim for damages which your respondent desires to assert is a personal claim for damages, and is not an action in rem; and the plaintiff, Mrs. Julia Caroline Sponenbarger, has no interest in your respondent's cause of action, and he has no interest in her cause of action.

## IV.

Your respondent has no desire to assert any control over the plaintiff's cause of action, nor to interfere with her conduct thereof; but, if your respondent is forced to assert his claim in the plaintiff's cause of action, then, for his own protection, he must assume control of the litigation, and deprive the plaintiff of the right to control her own lawsuit.

## V.

Your respondent's claim for damages cannot be properly asserted if he is forced to appear as a party in the innumerable suits of the innumerable separate land owners of the affected area, or lose his right if numerous other land owners have not in apt time filed their separate claims against the United States.

## VI.

The proof of damages which will be involved in your respondent's claim against the United States, and the proof of damage which will be involved in the plaintiff's claim against the United States, are entirely separate and distinct and will rest on entirely different rules and measures of

damage. Undertaking to combine the ascertainment of these different measures of damage growing out of entirely separate and distinct interests in entirely different areas will lead only to confusion, delay, unreasonable expense, and possible denial of justice to one or the other of the parties involved.

## VII.

Had the defendant, the United States, desired to assume the control of the issues involved, it should have instituted condemnation proceedings under the authority of the Flood Control Act of May 15, 1928, in which action it could have joined all parties defendant it might have desired.

38 Wherefore, the premises considered, your respondent prays that he be not involved in the present action, but be permitted to prosecute his own separate action now pending in the Court of Claims of the United States under the control and direction of that Court which holds jurisdiction.

Respectfully submitted,

GRADY MILLER,

As Receiver for the Southeast Arkansas  
Levee District, in His Official Capacity,  
Respondent.

By Joe W. House and Lamar Williamson,  
His Attorneys of Record.

Per Lamar Williamson.

Endorsed: "Filed Oct. 6, 1936, Sid B. Redding, Clerk."

39 (Appearance and Protest of Alex H. Rowell, et al., as  
Receivers of Cypress Creek Drainage District,  
to Order making them parties Plaintiff.)

In the United States District Court, Western Division of the  
Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Plaintiff  
vs. No. 7984

United States of America, Defendant.

Come Alex H. Rowell and William R. Humphrey, the duly appointed, qualified and acting Receivers of and for the Cypress Creek Drainage District, in their representative capacities, and, pursuant to the Order of this Court filed in the above styled cause September 26, 1936, enter their appearance in this action and submit to the jurisdiction of the



Court therein, but under protest, and noting their objections of record, and for cause state:

I. They, your Respondents, elected to prosecute their claim for damages against the United States Government resulting from the construction work done by the United States under the provisions of the Flood Control Act of May 15, 1928, referred to in the plaintiff's complaint, by their separate action. Therefore, on August 10, 1934, your Respondents filed their separate action against the United States in the Court of Claims of the United States of America under the style of "Cypress Creek Drainage District, a corporation, and A. H. Rowell and William R. Humphrey, as Receivers thereof, et al,—Petitioners and Claimants, vs. The United States of America—Defendant, No. 42719," which suit is still pending. Therefore, jurisdiction of the interest of your Respondents in the subject matter of the above styled action first attached in the Court of Claims of the United States of America, which Court still controls your Respondents' cause of action.

II. Your Respondents prefer to prosecute their own separate and distinct claim for damages against the United States in their own way, and in their own separate action.

III. The claim for damages which your Respondents desire to assert is a personal claim for damages, and is not an action in rem; and the plaintiff, Mrs. Julia Caroline  
40 Sponenbarger has no interest in your Respondents' cause of action, and they have no interest in her cause of action.

IV. Your Respondents have no desire to assert any control over the plaintiff's cause of action, nor to interfere with her conduct thereof; but, if your respondents are forced to assert their claim in the plaintiff's cause of action, then, for their own protection, they must assume control of the litigation, and deprive the plaintiff of the right to control her own lawsuit.

V. Your Respondents' claim for damages cannot be properly asserted if they are forced to appear as a party in the innumerable suits of the innumerable separate land owners of the affected area, or lose their right if numerous other land-owners have not in apt time filed their separate claims against the United States.

VI. The proof of damages which will be involved in your Respondents' claim against the United States, and the proof of damage which will be involved in the plaintiff's claim



against the United States, are entirely separate and distinct and will rest on entirely different rules and measures of damage. Undertaking to combine the ascertainment of these different measures of damage growing out of entirely separate and distinct interests in entirely different areas will lead only to confusion, delay, unreasonable expense, and possible denial of justice to one or the other of the parties involved.

VII. Had the defendant, the United States, desired to assume the control of the issues involved, it should have instituted condemnation proceedings under the authority of the Flood Control Act of May 15, 1928, in which action it could have joined all parties defendant it might have desired.

Wherefore, the premises considered, your Respondents pray that they be not involved in the present action, but be permitted to prosecute their own separate action now  
41 pending in the Court of Claims of the United States under the control and direction of that Court which holds jurisdiction.

Respectfully submitted,

ALEX H. ROWELL AND WILLIAM R.  
HUMPHREY As Receivers of the Cypress Creek Drainage District, in Their  
Respective Capacities . . . Respondents.

By Lamar Williamson, Hendrix Rowell  
and DeWitt Poe, Their Attorneys of  
Record,

Per Lamar Williamson.

Endorsed: "Filed Oct. 6, 1936, Sid B. Redding, Clerk."

42 Entry of Appearance and Answer of Mercantile-  
Commerce Bank and Trust Company and  
Mercantile-Commerce National Bank in St.  
Louis.

In the United States District Court Eastern District of Arkansas, Western Division.

Julia Caroline Sponenbarger, Plaintiff  
No. 7984 vs.

United States of America, Defendant.

Come now Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis and enter their appearance in the above entitled cause pursuant

to motion of the United States of America, the defendant therein, that they be made parties and answer as follows:

1. Mercantile-Commerce Bank and Trust Company is a corporation organized and existing under and by virtue of the laws of the State of Missouri with its principal place of business and post office address in the City of St. Louis in said State, and is successor by consolidation of Mercantile Trust Company and is authorized to be and is actually engaged in the business of accepting and executing trusts, and files this answer as Trustee under a pledge agreement executed by the Southeast Arkansas Levee District securing an issue of bonds of said District dated October 1, 1919, aggregating \$600,000.00 principal amount, hereinafter more particularly referred to; and as trustee under a pledge agreement executed by said District securing an issue of bonds of said District dated March 1, 1921, aggregating \$400,000.00 principal amount, hereinafter more particularly referred to; and as trustee under a pledge agreement executed by said District securing an issue of bonds of said District dated July 1, 1926, aggregating \$100,000.00 principal amount, hereinafter more particularly referred to; and as trustee under a pledge agreement executed by said District securing an issue of bonds of said District dated January 1, 1927, aggregating \$350,000.00 principal amount, hereinafter more particularly referred to.

2. Mercantile-Commerce National Bank in St. Louis is a corporation organized and existing under and by virtue of the laws of the United States of America, with its principal place of business and post-office address in the City of St. Louis, in the State of Missouri, and was formerly known as the National Bank of Commerce in St. Louis, and is authorized to and actually engaged in the business of accepting and executing trusts, and files this answer as Trustee under a pledge agreement executed by the Southeast Arkansas Levee District, securing an issue of bonds of said District, dated June 1, 1923, aggregating \$300,000.00 principal amount, hereinafter more particularly referred to, and as Trustee under a pledge agreement executed by said District securing an issue of bonds of said District dated November 1, 1924, aggregating \$300,000.00 principal amount, hereinafter more particularly referred to.

3. Southeast Arkansas Levee District is a quasi-municipal corporation created by Act No. 83 of the General Assembly of the State of Arkansas, approved February 14, 1917; as

amended by Act No. 93 of the General Assembly of the State of Arkansas, approved February 19, 1919; as amended by Act No. 487 of the General Assembly of the State of Arkansas, approved March 26, 1921; as amended by Act No. 139 of the General Assembly of the State of Arkansas, approved February 19, 1923.

4. Section 1 of the creative Act (Act No. 83 of the Arkansas General Assembly for the year 1917) provides, in part, that all that part of the State of Arkansas embraced and included in the boundaries of the Linwood and Auburn

44 Levee District, in Lincoln County and in Desha County, the Red Fork Levee District, the Desha Levee District, and the Chicot Levee District, subject to overflow and that had paid levee taxes for the past five years, was created into one levee district to be known as the "Southeast Arkansas Levee District," which territory roughly embraces all of Lincoln County, Arkansas, east of the Missouri Pacific Railroad Company's main line track, and all of Desha County and Chicot County in the State of Arkansas lying east of Bayou Bartholomew, all being within the area of the Boeuf River overflow Basin hereinafter referred to. The land described in plaintiff's petition is in said District.

5. Section 2 of said Act 83 creating the Southeast Arkansas Levee District provides that the object of said Act was for the protection of the people, their land and personal property, railroads, tramroads, telephone, telegraph and electric/light and power lines, and all other property, from the overflow waters of the Mississippi and Arkansas Rivers by a system of levee building, constructing and enlarging and maintaining the same along the banks of the Mississippi River and as far up and along the banks of the Arkansas River as is necessary to get the relief sought by said Act. It was further provided in said Section that in order to attain that object the said Southeast Arkansas Levee District should have such powers as were necessary to carry out the scheme of protection sought to be accomplished, in cooperation with the Mississippi River Commission and the Tensas Basin Levee Board of Louisiana.

6. It was further provided by Section 7 of said Act 83 that for the purpose of building, repairing and maintaining the line of levees contemplated, and for the purpose of carrying into effect the objects sought, it was declared and ascertained by the General Assembly of the State of Arkansas that the improvement contemplated was for the general pro-

45      tection within the territory of the District of all the people, their land, railroads, tramroads, telephone, telegraph, electric light and power lines, and all other property of every description from the overflow waters of the Mississippi and Arkansas Rivers and that benefits are incident to such protection; Section 8 of said Act 83 as amended by said Act 93 and as amended by said Act 139 provides in part that it was thereby ascertained and declared that all the real estate subject to overflow in said district, except the real estate included in the limits of any town in said district, was benefited annually to the extent of 30 cents per acre; there was thereby levied and assessed against each and every acre of such real estate in the district a tax of 30 cents per year; that each and all of the real estate subject to overflow included in the limits of any town in said levee district was benefited annually not less than 30 mills on the dollar of the assessed value thereof; there was thereby levied and assessed against each and all of said real estate within said district within the limits of any town, annually, a tax of 30 mills on the dollar of the assessed value thereof; that upon each and every railroad there was declared a benefit annually to the extent of \$250.00 per mile; there was thereby levied and assessed against each such railroad, its right of way subject to overflow, an annual tax of \$250.00 per mile; that there was declared a benefit to every telephone, telegraph, electric light and power line in the territory subject to overflow a benefit annually of not less than 30 mills on the assessed value thereof; there was thereby levied and assessed an annual tax of 30 mills on the assessed value thereof.

7. It was further provided by Section 11 of said Act creating the Southeast Arkansas Levee District that for the purpose of construction, maintaining and repairing the levees heretofore mentioned, said District should have the power to borrow money from time to time and to issue the necessary evidences of indebtedness for that purpose, including the re-  
 46      funding of all of the obligations incurred by the original districts hereinbefore named which were merged into the Southeast Arkansas Levee District.

8. Pursuant to said authority, in order to accomplish the purposes of its creation, and in order to raise funds with which to construct the levees authorized by the General Assembly of the State of Arkansas, the Southeast Arkansas Levee District did from time to time borrow moneys and issue therefor its interest-bearing evidences of indebtedness in the aggregate sum of \$2,957,500.00.



9. In order to repay said bonded indebtedness the General Assembly of the State of Arkansas has assessed an annual tax of 30 cents per acre on all rural lands within the boundaries of said District, and an annual tax of 30 mills on the dollar of the assessed valuation of all real property in towns and cities within the District, \$250.00 on each mile of railroad subject to overflow, and 30 mills on the dollar of all assessed valuations on all other property taxable within the District.

10. By proper legislation, this annual tax, levied for the purpose of paying said bond issues, is made a lien against all of the property so taxed.

11. Section 10 of said Act 83 provided that said taxes therein levied should constitute a lien on all of the property in said District against which they were assessed. Section 11 of said Act 83 provided in part that the Board of Directors of said District was required to set aside annually from the first revenue collected from any source whatsoever sufficient sums to pay the interest and maturities for the year on all of the outstanding bonds that might become due in such year, and for the purpose of securing said bonds and interest a lien was thereby charged on all of the lands, lots, railroad embankments and tramways, and all other property in said District subject to levee tax paramount to all other liens.

12. After the passage of the Flood Control Act by the Congress of the United States, hereinafter more particularly described, and for reasons hereinafter alleged, property owners within the district, realizing that their lands and property had been so damaged by said Act of Congress as to be worthless, or their values seriously impaired, ceased paying annual taxes to such an extent as to bring about defaults in all of the outstanding bonded indebtedness of the District, causing the inability of the District to meet the annual maturities of principal and interest of said indebtedness.

13. Whereupon, at the suit of the Trustees for the bondholders of said bonded indebtedness of said District, in the case of Mercantile-Commerce Bank and Trust Company, Trustee, Mercantile-Commerce National Bank in St. Louis, Trustee, plaintiffs, vs. Southeast Arkansas Levee District, defendant, with St. Louis Union Trust Company, Trustee, as Intervener, being all of the Trustees for all of the bond issues involved, the plaintiff, H. Grady Miller, was appointed by the United States District Court for the Western Division of the Eastern District of Arkansas, as Receiver.



14. Pursuant to said Act 83, as amended by Act 93 of the General Assembly of the State of Arkansas, approved February 19, 1919, said Southeast Arkansas Levee District duly issued its bonds dated October 1, 1919, aggregating \$600,000.00, of which there are now outstanding and unpaid bonds aggregating \$490,000.00 principal amount; said bonds are due and payable serially, September 1, 1931 to September 1, 1944, inclusive, bearing interest at the rate of 5 per cent per annum, payable March 1st and September 1st of each year, evidenced by coupons thereto attached; said District has failed and neglected to pay the bonds maturing September 1, 1931, September 1, 1932, and September 1, 1933, September 1, 1934, September 1, 1935, and September 1, 1936, and has failed and neglected to pay the interest on all of the  
48 bonds of said issue due and payable September 1, 1931, and subsequent thereto.

15. To secure the payment of said bonds, said Southeast Arkansas Levee District pledged, mortgaged and set over unto the Mercantile Trust Company, now Mercantile-Commerce Bank and Trust Company, of the City of St. Louis, as Trustee, the property and revenues of said District, including all uncollected assessments assessed by said Act 93 on all of the real estate, railroads and tramways in said district; together with all assessments that might thereafter be levied thereon; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied, and upon the entire revenues of the District from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they were payable out of the proceeds of taxes theretofore legally levied upon the real property, railroads and tramroads embraced within said District and benefited by said improvements, and that same are secured by a prior tax lien on all of said real property, railroads and tramroads, \* \* \* and that for the faithful performance of all covenants, recitals and stipulations therein contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied, and for the faithful performance in apt time and manner of every official act required and necessary to provide for the prompt payment of principal and interest of said bonds as they mature, the full faith, credit and resources of said Levee District were thereby irrevocably pledged.

16. Pursuant to said Act No. 83, as amended by said Act No. 93, of the General Assembly of the State of Arkansas, approved February 19, 1919, said Southeast Arkansas Levee District duly issued its bonds dated March 1, 1921, aggregating \$400,000.00 principal amount, all of which are outstand-

ing and unpaid, maturing serially September 1, 1938, to September 1, 1945, inclusive, bearing interest at the rate of 6 per cent per annum, payable semiannually March 1st and September 1st of each year; said District has failed and neglected to pay the interest due on all of said bonds, maturing September 1, 1931, and subsequent thereto.

17. To secure the payment of said bonds, said Southeast Arkansas Levee District pledged, mortgaged and set over unto the Mercantile Trust Company, now Mercantile-Commerce Bank and Trust Company, of the City of St. Louis, as Trustee, the property and revenues of said District, including all uncollected assessments assessed by said Act 93 on all of the real estate, railroads and tramways in said District, together with all assessments that might thereafter be levied thereon; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied, and upon the entire revenues of the District from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they were payable out of the proceeds of taxes theretofore legally levied upon the real property, railroads and tramroads embraced within said District and benefited by said improvements, and that same are secured by a prior tax lien on all of said real property, railroads and tramroads, \* \* \* and that for the faithful performance of all covenants, recitals and stipulations therein contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied, and for the faithful performance in apt time and manner of every official act required and necessary to provide for the prompt payment of principal and interest of said bonds as they mature, the full faith, credit and resources of said Levee District were thereby irrevocably pledged.

18. Pursuant to said Act 83, as amended by said Act 93, by said Act 487, and by said Act 139 of the General Assembly of the State of Arkansas, approved February 19, 1923, said Southeast Arkansas Levee District duly issued its bonds dated July 1, 1926, aggregating \$100,000.00 of which there are now outstanding and unpaid bonds aggregating the whole of said \$100,000.00 amount; said bonds are due and payable serially July 1, 1936, to July 1, 1956, inclusive, bearing interest at the rate of 5% per annum payable January 1st and July 1st of each year, evidenced by coupons thereto attached; said District has failed and neglected to pay the bonds maturing July 1, 1936 and has failed and neglected to pay the interest on all of the bonds of said issue due and payable January 1, 1932, and subsequent thereto.

19. To secure the payment of said bonds said Southeast Arkansas Levee District pledged, mortgaged and set over unto the Liberty Central Trust Company of the City of St. Louis, State of Missouri, as Trustee, all of the taxes authorized to be collected under the Acts of the Legislature upon the said subject recited in said bonds and all benefits assessed in said District; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied and upon the entire revenues of the District from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they are secured by a lien upon all lands, lots railroad embankments and tramways, and all other property in said District, subject to a levee tax, and that for the faithful performance of all covenants, recitals and stipulations in said bonds contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied and for the faithful performance in apt time and manner of each official act necessary to provide for the prompt payment of principal and interest of the bonds as they mature the full faith, credit, taxes and all benefits assessed in said District are thereby irrevocably pledged.

20. Pursuant to the terms of said pledge agreement said Liberty Central Bank & Trust Company duly resigned as Trustee in said pledge agreement and Mercantile-Commerce Bank and Trust Company was duly appointed and qualified and is now duly acting as Trustee in said pledge agreement with all the powers and authority as though it had been the Trustee originally named in said pledge agreement.

21. Pursuant to said Act 83, as amended by said 51 Act 93, as amended by said Act 487 and by said Act 139 of the General Assembly of the State of Arkansas, approved February 19, 1923, said Southeast Arkansas Levee District duly issued its bonds dated January 1, 1927, aggregating \$350,000.00 principal amount, of which there are outstanding and unpaid bonds aggregating \$334,000.00 principal amount maturing serially September 1, 1931, to September 1, 1945, bearing interest at the rate of 5% per annum, payable semi-annually March 1st and September 1st of each year; said District has failed and neglected to pay said bonds maturing September 1, 1931, September 1, 1932, September 1, 1933, September 1, 1934, September 1, 1935 and September 1, 1936, aggregating \$60,000.00 principal amount and to pay interest due on all said bonds maturing September 1, 1931, and subsequent thereto.

22. To secure the payment of said bonds said Southeast Arkansas Levee District pledged, assigned, transferred, mortgaged and set over to the St. Louis Union Trust Company of St. Louis, Missouri, as Trustee, the property and revenues of the District including all its revenues of every description derived from taxes theretofore or thereafter levied or collected or from any other source and all uncollected assessments levied by Act No. 139 of the General Assembly of 1923 on the real property, railroads and tramways in said District together with all assessments that might thereafter be levied thereon; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied and upon the entire revenues from the District from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they were payable out of the proceeds of taxes theretofore legally levied upon the real property, railroads and tramroads embraced within said District and benefited by said improvement, and were secured by prior tax lien upon all of said real property, railroads and tramroads \* \* \*, and that for the faithful performance of all covenants, 52 recitals and stipulations therein contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied and for the faithful performance in apt time and manner of every official act required and necessary to provide for the prompt payment of the principal and interest of said bonds as they matured, the full faith, credit and resources of said levee district were thereby irrevocably pledged.

23. Pursuant to the terms of said pledge agreement said St. Louis Union Trust Company duly resigned as Trustee in said pledge agreement and Mercantile-Commerce Bank and Trust Company was duly appointed and qualified and is now duly acting as Trustee in said pledge agreement with all the powers and authority as though it had been the Trustee originally named in said pledge agreement.

24. Pursuant to said Act 83, as amended by said Act 93, as amended by said Act 487, and as amended by said Act 139 of the General Assembly of the State of Arkansas, approved February 19, 1923, said Southeast Arkansas Levee District duly issued its bonds dated June 1, 1923, aggregating \$300,000.00, of which there are now outstanding and unpaid bonds aggregating \$285,000.00 principal amount; said bonds are due and payable serially September 1, 1931, to September 1, 1953, inclusive; bearing interest at the rate of 5½ per cent per



annum, payable March 1st and September 1st of each year, evidenced by coupons thereto attached; said District has failed and neglected to pay the bonds maturing September 1, 1931, September 1, 1932, September 1, 1933, September 1, 1934, September 1, 1935, and September 1, 1936, aggregating \$39,000.00 principal amount, and has failed and neglected to pay the interest on all of the bonds of said issue due and payable September 1, 1931, and subsequent thereto.

25. To secure the payment of said bonds, said Southeast Arkansas Levee District pledged, mortgaged and set over unto the National Bank of Commerce in St. Louis, now Mercantile-Commerce National Bank in St. Louis, of the City of St. Louis, as Trustee, the property and revenues of said district, including all uncollected assessments assessed by said Act 139 on all of the real estate, railroads and tramways in said district, together with all assessments that might thereafter be levied thereon; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied, and upon the entire revenues of the district from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they were payable out of the proceeds of taxes theretofore legally levied upon the real property, railroads, and tramroads embraced within said District and [benefit] by said improvement, and that same were secured by a prior tax lien on all of said real property, railroads, and tramroads \* \* \* and that for the faithful performance of all covenants, recitals and stipulations therein contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied, and for the faithful performance in apt time and manner of every official act required and necessary to provide for the prompt payment of principal and interest of said bonds as they matured, the full faith, credit and resources of said Levee District were thereby irrevocably pledged.

26. Pursuant to said Act 83, as amended by said Act 93, as amended by said Act 487, as amended by said Act 139, of the General Assembly of the State of Arkansas, approved February 19, 1923, said Southeast Arkansas Levee District duly issued its bonds dated November 1, 1924, in the aggregate principal amount of \$300,000.00, of which are now outstanding and unpaid \$282,000.00, maturing serially September 1, 1931, to September 1, 1950, inclusive, bearing interest at the rate of 5 per cent per annum, payable semiannually March 1st and September 1st of each year, evidenced by coupons thereto attached; said District has failed and neglected



to pay the bonds maturing September 1, 1931, September 1, 1932, September 1, 1933, September 1, 1934, September 1, 1935 and September 1, 1936, and has failed and neglected to pay the interest on all said bonds, maturing September 1, 1931, and subsequent thereto.

27. To secure the payment of said bonds, said Southeast Arkansas Levee District pledged, mortgaged and set over unto the National Bank of Commerce in St. Louis, now Mercantile-Commerce National Bank in St. Louis, of the City of St. Louis, as Trustee, the property and revenues of said District, including all uncollected assessments assessed by said Act 139 on all of the real estate, railroads and tramways in said District, together with all assessments that might thereafter be levied thereon; by said pledge agreement it was the intention to give to the bondholders a lien upon all the taxes levied and to be levied and upon the entire revenues of the District from whatever source derived, which said pledge agreement was duly recorded as required by law; said bonds reciting that they were payable out of the proceeds of taxes theretofore legally levied upon the real property, railroads and tramroads embraced within said District and benefited by said improvements, and that same are secured by a prior tax lien on all of said real property, railroads and tramroads \* \* \* and that for the faithful performance of all covenants, recitals and stipulations therein contained, for the proper application of the proceeds of the taxes theretofore or thereafter levied, and for the faithful performance in apt time and manner of every official act required and necessary to provide for the prompt payment of principal and interest of said bonds as they mature, the full faith, credit and resources of said Levee District were thereby irrevocably pledged.

28. By an "Act for the Control of Floods on the Mississippi River and its Tributaries, and For Other Purposes," approved May 15, 1928, hereinafter called the "Flood Control Act," the United States adopted, and enacted into law, a project for the flood control of the Mississippi River in its alluvial valley, and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1937, and printed in House Document No. 90, Seventieth Congress, First Session, which engineering plan is commonly called the "Jadwin Plan." The Act provides for raising the levees of the Mississippi River generally three feet, for improving the carrying capacity of the main channel of the River by revet-

ment work, and for limiting the flood waters in this channel to its safe capacity through the provision of specific diversion channels. Among these is the Boeuf Floodway, which will carry excess flood waters from a point below the mouth of the Arkansas River across and over a large portion of the area constituting the Southeast Arkansas Levee District, completely traversing said Levee District to and through the Boeuf River Basin into the backwater area at the mouth of the Red River in the State of Louisiana. The Plan leaves the section of the Mississippi River Levee running from approximately the mouth of Cypress Creek, in Desha County, Arkansas, south to approximately Luna Landing, in Chicot County, Arkansas (being the levee which constitutes an important part in the eastern protection boundaries of said Southeast Arkansas Levee District), known as the "fuse-plug levee," at its height on the date of the passage of the Act; but as the levees elsewhere have been, and are to be, raised three and one-half feet and materially strengthened, preventing overflow at other points, the volume of water passing into this diversion channel has been, and will be greatly increased.

29. The maximum previous overflow of water into the Boeuf Basin occurred in 1927 and was estimated at 450,000 cubic feet per second. Said Flood Control Act involves an intentional, additional, occasional flooding, damaging and destroying the lands and property within said District, title to which has been acquired by said District, and of lands and property on which said District holds said statutory lien as its sole and only income for the purpose of discharging its

56 bonded indebtedness, as the direct consequence of the constructions of the entire project (Jadwin Plan) by the Government to relieve the channel of the River in times of high water, all of which was contemplated by the Congress when enacting said Flood Control Act, and constitutes a taking of property for public use for which the Government of the United States is liable to Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank, as upon an implied contract, for such compensation as might have been awarded Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis had condemnation proceedings been instituted by the Government of the United States.

30. Said Flood Control Act provided that a Board to consist of the Chief of Engineers, the President of the Mississippi River Commission, and a civil engineer chosen from civil life, be appointed by the President of the United States,

by and with the consent and advice of the Senate, which Board was authorized and directed to consider the engineering differences between the adopted project (Jadwin Plan) and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and to recommend to the President such action as such Board might deem necessary to be taken in respect to such engineering differences, and it was provided further that the decision of the President upon all recommendations or questions submitted to him by such Board should be followed in carrying out the project adopted. There were very substantial differences in the plan of the Mississippi River Commission for the Boeuf River Floodway diversion as it affected the Southeast Arkansas Levee District and its property, and the plan of the Army Engineers (Jadwin Plan), so that said district could not know just how its property was to be affected until those engineering differences were adjusted and settled.

31. Said Special Board created by Section 1 of said Flood Control Act reported to the President of the United States on August 8, 1928, recommending the engineering of the Jadwin Plan (the adopted project), and on August 13, 1928, the President of the United States approved "the policy and method of dealing with the problem set out in the report, dated August 1, 1928", of said Special Board, and the Jadwin Plan thereby, on August 13, 1928, for the first time became definite, certain and fixed as a matter of law, insofar as it affects the Southeast Arkansas Levee District and the property herein involved. Work on the project by the United States Government began immediately on or after August 13, 1928, funds for the purpose being available, and construction work on the plan of flood control is now approximately 70 per cent complete.

32. The project of flood control as adopted by the Flood Control Act of May 15, 1928, for which the Government of the United States assumed responsibility, differed from the old flood control system of levees, and levees only, by the deliberate creation of certain diversion channels to be sacrificed for the protection of the balance of the alluvial valley of the Mississippi River. The then Chief of Engineers, in his report to the Secretary of War, which was submitted by the Secretary of War to the Congress in connection with the Jadwin Plan, which was enacted into law by said Flood Control Act, states that:

"The recommended plan (Jadwin Plan) fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity, and

sends the surplus water through lateral floodways. Its essential features and their functions are:

"Floodways from Cairo to New Madrid, from the Arkansas River through the Tensas Basin to the Red River, and from the Red through the Atchafalaya Basin to the Gulf of Mexico. These will relieve the main channel of the water it cannot carry and lower the floods to stages at which levees can carry them." (Document No. 90, House of Representatives, 70th Congress, 1st Session, pp. 304.)

33. The Jadwin Plan as enacted into law by said Flood Control Act further describes the plan for flood control as it affects the property described in plaintiff's petition, which is protected only by the "fuse-plug" or "safety-plug" section of the levee immediately below the mouth of Cypress Creek in Desha County, Arkansas, as follows:

58 "16. From the mouth of the Arkansas (River) to the Old River, at the mouth of the Red (River), extreme floods cannot be carried between levees of the Mississippi (River) without dangerous increase in their heights. A floodway for excess floods is provided down the Boeuf River, on the west side of the River. Excess water cannot be carried through the section on the east side, since it would be forced back into the main river by the highlands on the east bank below Vicksburg and have to be carried thence for 160 miles between the main river levees to the mouth of the Red River. The entrance to the floodway is closed by a safety-plug section of the levee, at present grade, which is located at Cypress Creek near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi (River), from the Arkansas to the Red, will be raised about 3 feet. To prevent flood waters from entering the Tensas Basin, except into the floodway during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary.

"17. The Section at the head of the floodway will protect the land within the floodway levees against any flood up to one of the magnitude of the 1922 flood. A flood of the magnitude somewhere between that of 1922 and of 1927, will break it, turning the excess water down the floodway, which will carry it safely to the backwater area at the mouth of the Red River." (Document No. 90, p. 6.)

34. Said Jadwin Plan, enacted into law by said Flood Control Act, further recites, and it is the fact that:



"The confinement of flood flows by levees has substantially raised the flood heights." (Document No. 90, p. 19.)

"96. The confinement of the Mississippi River within levees and the great development of drainage systems in recent years have raised flood stages materially and this raising has exceeded estimates made in the past. Were it attempted to hold the water within the present levee lines by raising them, river stages are possible as much as \* \* \* 14 feet above the present levee grade at Arkansas City, \* \* \* The levees now have an average height of about 18 feet. The practical means to meet this situation is to spill the water out of the main leveed channel at selected points when the stages reach the danger point.

"97. The water within the river channel does no damage whatever and it should be kept within the channel as long as possible. The excess must be spilled through safety valves when the volume exceeds the safety capacity of the river. These safety valves consist of one controlled spillway, several relief or fuse-plug levees at present grade and one levee of reduced height, all emptying into natural floodways, wholly or partially leveed." (Document No. 90, p. 23.)

59. "The levees generally will be raised about 3 feet, so that the selected, weaker relief levees will be at about the elevation of the present levee top and will surely serve their purpose." (Document No. 90, p. 24.)

"118. To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River Bottom, where natural ridges do not serve, from the Cypress Creek levee to back-water in the lower Tensas Basin. Arkansas City is to be enclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees." (Document No. 90, page 28.)

35. These side levees or guide levees have not yet been constructed by the Government, but the property described in plaintiff's petition is in the floodway whether said floodway be controlled or uncontrolled, as at the present, and is subject to inundation and destruction whenever the fuse-plug



levee gives way to protect the balance of the alluvial valley of the Mississippi River.

"Due to the increase in flood height by reason of levee construction and drainage, it has been estimated that a stage over the present top at Cypress Creek might occur in the long run about once in twelve years." (Document No. 90, p. 28.)

"121. The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible floods." (House Document No. 90, p. 28.)

"The draw down from Cypress Creek relief levee into the Boeuf River diversion below makes it possible to protect the lower part of this section of the river from superfloods without excessive levee raising. \* \* \* the average amount that levees are to be raised throughout is approximately 3-1/2 feet above the present adopted grade." (Document No. 90, pp. 29-30.)

Section 4 of the Flood Control Act provides:

"Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River \* \* \*."

60 36. The waters that will flow into the Boeuf Floodway or diversion channel will all be diverted from the main channel of the Mississippi River at a place and in a manner which has never been true before, but which subjects the property described in plaintiff's petition to inundation, damage and destruction whenever a flood stage is reached in the Mississippi River sufficient to overtop or wash away the fuse-plug levee hereinbefore mentioned. The main levees of the Mississippi River have been strengthened and raised so as to now insure the flooding of the property described in plaintiff's petition at predetermined stages of the River. The purpose of leaving the fuse-plug levee hereinbefore mentioned (the only protection of the land described in plaintiff's petition) is solely for the purpose of having the water break over same at flood tide and flood this diversion channel or floodway in which the land described in plaintiff's petition is situated. It is an uncontrollable spillway. There is no provision of law for rebuilding the fuse-plug levee when it washes out, but the land described in plaintiff's petition will then be left free to the ravages of the escaping waters of the Mississippi River with no protection whatever.

37. Pursuant to the provisions of said Flood Control Act, from Helena South the levees on the west bank of the Mississippi River will be maintained at sufficient height to hold all of the flood waters which reach this point from the entire basin of the upper Mississippi River and all of its tributaries, carrying all of this water within the levees to a point about 12 miles distant from a similar levee on the south bank of the Arkansas River. Through this gap the White River passes into the Mississippi River about midway between the lower end of the levee on the west bank of the Mississippi River above mentioned, and the mouth of the Arkansas River. Lying between these levee ends to the north and west of the 12-mile gap is located a pool or basin for backwater some twelve hundred square miles in area into which will  
 61 be poured all of the waters of the White River and its watershed, as well as the overflow on the north bank of the Arkansas River for a distance upstream to the locality of Pine Bluff, Arkansas.

38. It is not contemplated under the present law that any levee will be built along this stretch of the River. When this basin of twelve hundred square miles is filled, its outlet, together with all water coming down the White and Arkansas Rivers, will be discharged through the 12-mile gap above described.

39. This combined volume will be added to that in the main stream of the Mississippi River, consisting both of its own water brought down in its own channel from Cairo, Illinois, and also the quantity of water which will have been returned into the Mississippi River, under the present law, from the St. Francis River north of Helena; then for a few miles the comparatively narrow channel of the main levees of the Mississippi River will carry this enormous volume of concentrated flood water until it reaches, and is hurled against, the fuse-plug levee at the head of the Boeuf River Basin hereinbefore referred to, a comparatively short distance from the land described in plaintiff's petition. The "fuse-plug" levee is so named because in due course during flood stages of the Mississippi River this stretch of the levee will break and be washed out when the River reaches the predetermined height fixed by the Army Engineers, in similar fashion to what happens when a current of electricity attains a designed voltage sufficient to blow out the fuse in electrical machinery. It is contemplated that this concentration of flood water upon the fuse-plug levee will overtop the fuse-plug levee and cause a crevasse through the fuse plug levee which will gradually widen to include the whole of

twenty or more miles of said relief levee if the condition of the Mississippi River so requires for the safety of the remainder of its alluvial valley.

62 40. The causes of damage to land described in plaintiff's petition, and the physical conditions involved in this litigation resulting in such damage, are identical to those involved and recited in the decision in the case of Patrick J. Hurley vs. F. Foster Kincaid, Sr., 285 U. S. 95, 525 S. Ct. 267, 76 Law ed. 637, more particularly described in the opinions of the courts in the same case below reported at 49 F. (2d) 768, affirmed 37 F. (2d) 602, except that said lands are located at the very head of the floodway, a comparatively few miles distant from the fuse-plug levee, its only protection. When the fuse-plug levee breaks, the land described in plaintiff's petition will be subjected to the immediate, destructive onrush of water.

41. Prior to the adoption of the Flood Control Act, the Southeast Arkansas Levee District, and all of the property owners interested therein whose property is now protected only by said fuse-plug levee, had, and exercised, their legal right of protecting themselves against inundation by raising the present fuse-plug levee during flood times. This right of defense has been taken from the petitioner, and the owners of the property within said Southeast Arkansas Levee District by the Flood Control Act.

42. Paragraph numbered 120 of the adopted project provides as the key to the entire system of flood control that:

"The United States must have control over the Cypress Creek-levee and keep it at substantially its present strength and present height" (Document No. 90, p. 28).

Paragraph numbered 118 of the adopted project further provides that:

"To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., three feet below the new levee grade."

Section 3 of said Flood Control Act further provides:

63 " \* \* \* If in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified, or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the River are subjected to overflow and damage which are not

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now overflowed or damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

43. The levees on the opposite banks of the River from their property have been constructed and raised as hereinbefore described and as directed by law, so that their property is now subject to overflow and damage by the break of the fuse-plug levee within the meaning of this Section of said Flood Control Act, again constituting a taking of its property for which the owners are entitled to just compensation under the provisions of the Act, as well as under the Fifth Amendment to the Constitution of the United States.

44. By the express provision of Section 3 of said Flood Control Act "no local contribution to the project herein adopted is provided." Prior to the adoption of said Flood Control Act, the land described in plaintiff's petition enjoyed equal protection against flood menace, without discrimination, but the primary purpose of the said Flood Control Act is to protect the balance of the alluvial valley of the Mississippi River by sacrificing said property and the property of others within the Bonf River spillway similarly situated. Unless, therefore, owners are compensated for all damages by them sustained as herein alleged, then they will be forced to contribute the entire damages to the project, notwithstanding said provision of the Act to the contrary.

45. The adopted project has destroyed the entire salable value of said lands, and has destroyed the ability of said lands to discharge the tax burden against them due to the said Levee District, and has impaired and practically

64 destroyed the full use and enjoyment of said property for all practical purposes. The result of setting apart this area as a floodway or diversion channel and of preventing the escaping of the flood waters of the Mississippi River elsewhere, and the intentional dedication of this property as a floodway of said Flood Control Act, has subjected the property to flood menace at any and all times. The uncertainty of the safety of persons living upon said property makes it unwise and unsafe to develop said property agriculturally, or to undertake to use said property at any time. The adopted project has had the effect of casting a cloud on the title of said district to the said land and property, and on liens thereon, so that said lands have been deprived of all reasonable market value therefor, and persons cannot be interested in developing said lands into profitable farms, or



to use said lands for any other purpose for which they are fitted, because the Government of the United States has substantially taken possession of the property for a diversion channel or floodway of the Mississippi River, to the damage of Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis in the amount of the benefits taxed against said land and pledged to them.

46. Notwithstanding the fact that the Fifth Amendment of the Constitution of the United States provides: " \* \* \* nor shall any person \* \* \* be deprived \* \* \* of property without due process of law, nor shall private property be taken for public use without just compensation," and notwithstanding the provision of said Flood Control Act: "That the United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River," and notwithstanding the further provision of said Act that the "Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights of way which, in the opinion of the Secretary of War, and the Chief of Engineers, are needed in carrying out this project, the

65 said proceedings to be instituted in the United States District Court for the District in which the lands, easements or rights of way is located," no condemnation proceedings of any kind has been commenced against said land, nor against any other person for the condemnation of the property now owned by the Southeast Arkansas Levee District, and no compensation of any kind has been paid or offered to the petitioner for the taking or damage of the property herein involved as aforesaid.

Wherefore, the premises considered, Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis pray judgment against the Government of the United States in the sum of the benefits assessed against the land described in plaintiff's petition and pledged to them, plus interest at the rate of 6 per cent from March 1, 1931, and for all other and further general relief to which the premises and proof may show them entitled.

**MERCANTILE-COMMERCE BANK AND  
TRUST COMPANY,  
MERCANTILE-COMMERCE NATIONAL  
BANK IN ST. LOUIS.**

By Thompson, Mitchell, Thompson and  
Young.

By Fred W. Armstrong.

Endorsed: "Filed Dec. 22, 1936, Sid B. Redding, Clerk."

66 Separate Petition of St. Louis Union Trust Company  
Individually and in Its Own Right and As Trustee for Bondholders in a Pledge Instrument and Mortgage Executed By the Cypress Creek Drainage District.

In the United States District Court, Eastern District of  
(Arkansas, Western Division.

○ Mrs. Julia Caroline Spönenbarger, Plaintiff,  
No. 7984 vs.

The United States of America, Defendant.

Comes the plaintiff, St. Louis Union Trust Company, individually and in its own right and as trustee for bondholders in a pledge instrument and mortgage executed by the Cypress Creek Drainage District in pursuance of the order of the Court requiring it to appear in this action and to plead, answer or demur in this cause, and states that it heretofore filed in the Court of Claims of the United States of America a petition against the defendant for damages to its liens as said trustee on all of the lands embraced in the area of the Cypress Creek Drainage District because of the destruction and damage to said lands by reason of the adoption of the Flood Control Act and the putting into effect of the Jadwin Plan; that the defendant demurred to said petition on the ground that the landowners only were entitled to any damages that may have resulted from the passage of said Act and putting into effect the said Plan; that the demurrer of the defendant was overruled; that the lands of Mrs. Julia Caroline Spönenbarger, the original Plaintiff in this action, are embraced within the area of the Cypress Creek Drainage District, and this plaintiff, therefore, states that it, in its capacity as said Trustee, has an action pending for damages for the destruction and damage to its lien against said Plaintiff's lands.

That it is informed that the aforesaid matters were brought to the attention of this Court prior to the time that the motion of the Defendant requiring this Plaintiff to be made a party plaintiff was granted.

That without prejudice to its cause of action pending in the Court of Claims of the United States of America it files this its Separate Petition in this cause and for its cause of action against the Defendant states:

I.

67 It is the owner of bonds issued by the Cypress Creek Drainage District in the principal amount of \$167,500.00.

## II.

The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Missouri and as such is authorized to accept and execute trusts.

## III.

The Cypress Creek Drainage District is a quasi-municipal corporation, created and functioning under the provisions of Act No. 110 of the General Assembly of the State of Arkansas, approved March 18, 1911; as amended by Act No. 455 of the General Assembly of the State of Arkansas, approved June 2, 1911; as amended by Act No. 80 of the General Assembly of the State of Arkansas, approved February 25, 1915; as amended by Act No. 454 of the General Assembly of the State of Arkansas, approved March 28, 1919; as amended by Act No. 79 of the Special Acts of the General Assembly of the State of Arkansas, approved February 7, 1920; as amended by Act No. 260 of the General Assembly of the State of Arkansas, approved March 10, 1921.

The area comprising Cypress Creek Drainage District is more particularly described in the Acts of the General Assembly of the State of Arkansas hereinabove referred to, but all lies within the area of the Boeuf River Basin Floodway hereinafter referred to and more particularly described hereafter in connection with an explanation of the effect of the Flood Control Act of the United States upon the rights and property of the Plaintiff herein.

For a good many years the owners of property within the present boundaries of Cypress Creek Drainage District had contributed large sums of money annually for the building of levees along the west bank of the Mississippi River, in order to protect said area from the ravages of the flood waters of the Mississippi River, in which work the United States Government participated and co-operated. A large area of land in the State of Arkansas to the West and North of Cypress Creek, in Desha County, in the State of Arkansas, was drained naturally into the Mississippi River through said Cypress Creek. It became evident that protection against the floods of the Mississippi River to the area of the Cypress Creek Drainage District, would never become successful until the mouth of Cypress Creek was closed by proper  
68 levees, because so long as the mouth of Cypress Creek remained open as a drainage outlet the rising waters of the Mississippi River entered therein, flowed upon Cypress Creek, and from thence overflowed the area of this district.

Therefore, the United States Government, acting through the Bureau of Drainage Investigation of the United States Department of Agriculture, prepared plans and specifications for the present drainage system which has been constructed by the said Cypress Creek Drainage District for the purpose of protecting the territory of said district from floods from the gap in the Mississippi River levee between Jefferson Lake and Cypress Creek; and to provide a complete and thorough system of drainage for surface water, made necessary by the closing of said gap in the levee of the Mississippi River, as is recited in Section 3 of Act No. 80 of the General Assembly of the State of Arkansas, approved February 25, 1915, to which reference is hereby specifically made.

In order to construct the proper levees and drains to insure the proper flood protection and drainage within the territory of this district, it became necessary for said Cypress Creek Drainage District to borrow large sums of money, it having no means whatever of its own. In order to enable said district to borrow the necessary funds, the General Assembly of the State of Arkansas authorized the assessment of benefits against all of the territory of said district, which assessment of benefits is by law declared to be the true amount by which each particular unit of property is increased in value because of the improvement contemplated and made. By the provisions of the Acts aforesaid, the amount of these benefits or betterments were made a lien against each particular unit of property, and the said district was authorized by law to pledge annual installments of these benefits to trustees as security for the payment of all bonds issued by the district. Proper provisions of law were made for the foreclosure by the district of its lien against property which might default in the annual payment of the amounts due as aforesaid.

Under authority of said Acts, for the purpose aforesaid, said Cypress Creek Drainage District borrowed the total sum of \$1,800,000.00, and issued its good and sufficient, valid and legal bonds therefor, to secure which it pledged  
69 all of the benefits or betterments which had been assessed, pursuant to law, against all of its territory, aggregating a total sum of \$5,817,709.40.

After the passage of the Flood Control Act by the Congress of the United States, on May 15, 1928, for the reasons hereinafter more particularly alleged, the property owners within the Cypress Creek Drainage District, realizing that their lands and property had been so damaged and destroyed by said Act of Congress as to be practically worthless, and their values so seriously impaired as not to be worth the



tax burden thereon, and realizing that the assessed benefits due to the Cypress Creek Drainage District had been completely appropriated, taken and destroyed by said Flood Control Act of May 15, 1928, ceased paying the annual tax and installments of benefits to such an extent as to bring about default on the part of the district in all of the outstanding bonded indebtedness of the district, because of the inability of the district to meet its annual maturities of principal and interest on said bonded indebtedness, said district having no other source of income whatever.

Whereupon, on December 31, 1929, the St. Louis Union Trust Company, of St. Louis, Missouri, and the Franklin-American Trust Company, of St. Louis, Missouri, representing and acting for the second, third and fourth issues of bonds of the Cypress Creek Drainage District, filed suit in the United States District Court for the Eastern Division of the Eastern District of Arkansas, against the Cypress Creek Drainage District, praying for the appointment of a Receiver to take charge of all of the affairs of said Cypress Creek Drainage, in which suit, thereafter, M. H. Rorick, as Trustee for the first bond issue of said district, intervened and became a party, so that all of the trustees for each and all of the bond issues of said Cypress Creek Drainage District were, and are, parties to said action in said United States District Court, which is styled, St. Louis Union Trust Company and Franklin-American Trust Company, Plaintiff, v. Cypress Creek Drainage District, Defendant, No. 2336, in Equity.

Whereupon, on January 15, 1930, pursuant to the prayer of the petitioners in said action, said District Court of the United States appointed A. H. Rowell, of Pine Bluff, Arkansas, and William R. Humphrey, of St. Louis, Missouri, as Receivers, with full and complete authority to take possession and complete control of all of the property, assets and rights of every kind and character belonging to the said Cypress Creek Drainage District.

#### IV.

The plaintiff alleges that under said Flood Control Act of Congress the United States adopted, and enacted into law, a project for the flood control of the Mississippi River in its alluvial valley, and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No.



90, 70th Congress, 1st Session, which engineering plan is commonly called the "Jadwin Plan." The Act provides for raising the levees of the Mississippi River generally three feet, for improving the carrying capacity of the main channel to its safe capacity through the provision of specified diversions channels. Among these is the Boeuf River Basin Floodway which will carry excess flood waters from a point below the mouth of the Arkansas River across and over a large portion of the area constituting the Cypress Creek Drainage District, completely traversing said Drainage District to and through the Boeuf River Basin into the back-water area at the mouth of the Red River in the State of Louisiana. The plan leaves the section of the Mississippi River Levee running from approximately the mouth of Cypress Creek in Desha County, Arkansas, south to approximately Luna Landing in Chicot County, Arkansas (being the levee which constitutes an important sector in the eastern protection boundary of said Cypress Creek Drainage District), known as the "fuse-plug levee," at its height on the date of the passage of the Act; but as the levees elsewhere have been, and are to be, raised  $3\frac{1}{2}$  feet and materially strengthened, prevent overflow at other points, the volume of water passing into this diversion channel has been, and will be, greatly increased.

The maximum previous overflow of water into the Boeuf Basin occurred in 1927 and was estimated at 450,000 cubic feet per second. Said Flood Control Act involves an intentional, additional, occasional flooding, damaging and destroying of the lands and property within said District, title to which has been acquired by said District, and of lands and property on which said District holds said statutory  
71 lien as its sole and only income for the purpose of discharging its said bonded indebtedness, as the direct consequence of the construction of the entire project (Jadwin Plan) by the Government to relieve the channel of the River in times of high water, all of which was contemplated by the Congress when enacting said Flood Control Act, and constitutes a taking of plaintiff's property and its liens on said lands for public use for which the Government of the United States is liable to the plaintiff, as upon an implied contract, for such compensation as might have been awarded plaintiff had condemnation proceedings been instituted by the Government of the United States.

## V.

Said Flood Control Act provided that a Board to consist of the Chief of Engineers, the President of the Mississippi

River Commission, and a civil engineer chosen from civil life, be appointed by the President of the United States, by and with the consent and advice of the Senate, which Board was authorized and directed to consider the engineering differences between the adopted project (Jadwin Plan) and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and to recommend to the President such action as such Board might deem necessary to be taken in respect to such engineering differences, and it was provided further that the decision of the President upon all recommendations or questions submitted to him by such Board should be followed in carrying out the project adopted. There were very substantial differences in the plan of the Mississippi River Commission for the Boeuf River Floodway diversion and the plan of the Army Engineers (Jadwin Plan), as it affected the Cypress Creek Drainage District and its property, so that said District could not know just how its property was to be affected until those engineering differences were adjusted and settled.

Said Special Board created by Section I of said Flood Control Act reported to the President of the United States on August 8, 1928, recommending the engineering of the Jadwin Plan (the adopted project), and on August 13, 1928, the President of the United States approved "The policy and method of dealing with the problem set out in the report, dated August 8, 1928, and the plan for the first time became definite, certain and fixed as a matter of law, in so far

72 as it affects the Cypress Creek Drainage District and its property herein involved. Work on the project by the United States Government began, immediately on August 13, 1928, funds for the purpose being available, and construction work on this plan of flood control is now approximately 70 per cent complete, this plaintiff's property has been taken thereby as herein alleged.

## VI.

The project of flood control as adopted by the Flood Control Act of May 15, 1928, for which the Government of the United States assumed responsibility, differed from the old flood control system of levees, and levees only, by the deliberate creation of certain diversion channels to be sacrificed for the protection of the balance of the alluvial valley of the Mississippi River. The then Chief of Engineers, in his report to the Secretary of War, which was submitted by the Secretary of War to the Congress in connection with the

Jadwin Plan, which was enacted into law by said Flood Control Act, states that:

"The recommended plan (Jadwin Plan) fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity, and sends the surplus water through lateral floodways. Its essential features and their functions are:

"Floodways from Cairo to New Madrid, from the Arkansas River through the Tensas Basin to the Red River, and from the Red through the Atchafalaya Basin to the Gulf of Mexico. These will relieve the main channel of the water it cannot carry and lower the floods to stages at which the levees can carry them" (Document No. 90, House of Representatives, 70th Congress, 1st Session, pp. 304).

The Jadwin Plan, as enacted into law by said Flood Control Act, further describes the plan for flood control as it affects the plaintiff's property, which is protected only by the "fuse-plug" or "safety-plug" section of the levee immediately below the mouth of Cypress Creek in Desha County, Arkansas, as follows:

"16. From the mouth of the Arkansas (River) to the Old River, at the mouth of the Red (River), extreme floods cannot be carried between levees of the Mississippi (River) without dangerous increase in their heights. A floodway for excess floods is provided down the Boeuf River, on the west side of the river. Excess water cannot be carried through the section on the east side, since it would be forced back into the main river by the highlands on the east bank below Vicksburg and have to be carried thence for 160 miles between the main river levees to the mouth of the Red River. The entrance to the floodway is closed by a safety plug section of the levee, at present grade, which is located at Cypress Creek, near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi (River), from the Arkansas to the Red, will be raised about three feet. To prevent flood waters from entering the Tensas Basin, except into the floodway during high floods, the levees on the south side of the Arkansas will be strengthened and raised about three feet as far upstream as necessary."

"17. The Section at the head of the floodway will protect the land within the floodway levees against any flood up to one of the magnitude of the 1922 flood. A flood of the magnitude somewhere between that of 1922 and of 1927 will break it, turning the excess water down the floodway, which will

carry it safely to the backwater area at the mouth of the Red River." (Parentheses ours.) (Document No. 90, p. 6.)

Said Jadwin Plan, enacted into law by said Flood Control Act, further recites, and the plaintiff alleges:

"The confinement of flood flows by levees has substantially raised the flood heights." (Document No. 90, p. 19.)

"96. The confinement of the Mississippi River within levees and the great development of drainage systems in recent years have raised flood stages materially, and this raising has exceeded estimates made in the past. Were it attempted to hold the water within the present levee lines by raising them, river stages are possible as much as \* \* \* fourteen feet above the present levee grade at Arkansas City, \* \* \*. The levees now have an average height of about eighteen feet. The practical means to meet this situation is to spill the water out of the main leveed channel at selected points when the stages reach the danger point."

"97. The water within the river channel does no damage whatever, and it should be kept within the channel as long as possible. The excess must be spilled through safety valves when the volume exceeds the safe capacity of the river. These safety valves consist of one controlled spillway, several relief or fuse-plug levees at present grade and one levee of reduced height, all emptying into natural floodways wholly or partially leveed." (Document No. 90, p. 23.)

"The levees generally will be raised about three feet, so that the selected, weaker relief levees will be at about the elevation of the present levee top and will surely serve their purpose." (Document No. 90, p. 24.)

"118. To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., three feet below new levee grade. This

relatively weak section will be long enough to discharge  
74 the greatest predicted possible excess water over and above the capacity of the leveed river below. In order

to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River Bottom, where natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be enclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees." (Document No. 90, p. 28.)



(These side levees or guide levees, have not yet been constructed by the Government; but the property against which Plaintiff has liens is in the floodway, whether said floodway be controlled or uncontrolled as at the present, and is subject to inundation and destruction whenever the fuse-plug levee gives way to protect the balance of the alluvial valley of the Mississippi River.)

"Due to the increase in flood height by reason of levee construction and drainage, it has been estimated that a stage over the present top at Cypress Creek might occur in the long run about once in twelve years." (Document No. 90, p. 28.)

"121. The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible floods." (House Document No. 90, p. 28.)

"The draw down from Cypress Creek relief levee into the Boeuf River diversion below makes it possible to protect the lower part of this section of the river from superfloods without excessive levee raising. \* \* \* The average amount that levees are to be raised throughout is approximately three and one-half feet above the present adopted grade." (Document No. 90, pp. 29-30.)

"The plan proposes the strengthening of the levees on the south side of the Arkansas and Red Rivers and raising them about three feet, as far upstream as is necessary for that purpose." (Document No. 90, p. 30.)

## VII.

Section 4 of the Flood Control Act provides:

"Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River \* \* \*."

The waters that will flow into the Boeuf Floodway or diversion channel will all be diverted from the main channel of the Mississippi River at a place and in a manner which has never been true before, but which subjects the property against which plaintiff has liens to inundation, damage and destruction whenever a flood stage is reached in the Mississippi River sufficient to overtop or wash away the fuse-plug levee hereinbefore mentioned. The main levees of the Mississippi River have been strengthened and raised so as to now insure the flooding of the plaintiff's property at pre-



determined stages of the river. The purpose of leaving the fuse-plug levee hereinbefore mentioned is solely for the purpose of having the water break over same at flood side and flood this diversion channel or floodway in which plaintiff's property is situated. It is an uncontrolled spillway. There is no provision of law for rebuilding the fuse-plug levee when it washes out, but plaintiff's property will then be left free to the ravages of the escaping waters of the Mississippi River with no protection whatever.

Pursuant to the provisions of said Flood Control Act, from Helena South the levees on the west bank of the Mississippi River will be maintained at sufficient height to hold all of the flood waters which reach this point from the entire basin of the upper Mississippi River and all of its tributaries, carrying all of this water within the levees to a point about twelve miles distant from a similar levee on the south bank of the Arkansas River. Through this gap the White River passes into the Mississippi River about midway between the lower end of the levee on the West bank of the Mississippi River above mentioned and the mouth of the Arkansas River. Lying

76 between these levee ends to the north and west of the 12-mile gap is located a pool or basin for backwater some twelve hundred square miles in area, into which will be poured all of the waters of the White River and its watershed, as well as the overflow on the north bank of the Arkansas River for a distance upstream to the locality of Pine Bluff, Arkansas.

It is not contemplated under the present law that any levee will be built along this stretch of the River. When this basin of twelve hundred square miles is filled, its outlet, together with all water coming down the White and Arkansas Rivers, will be discharged through the 12-mile gap above described.

This combined volume will be added to that in the main stream of the Mississippi River, consisting both of its own water brought down in its own channel from Cairo, Illinois, and also the quantity of water which will have been returned into the Mississippi River under the present law, from the St. Francis River Basin north of Helena; then for a few miles the comparatively narrow channel of the main levees of the Mississippi River will carry this enormous volume of concentrated flood water until it reaches and is hurled against the fuse-plug levee at the head of the Boeuf River Basin hereinbefore referred to, a comparatively short distance from the plaintiff's property. The "fuse-plug" levee is so named because in due course during flood stages of the Mississippi River this stretch of the levee will break and be

washed out when the River reaches the predetermined height fixed by the Army Engineers, in similar fashion to what happens when a current of electricity attains a designated voltage sufficient to blow out the fuse in electrical machinery. It is contemplated that this concentration of flood water upon the fuse-plug levee will overtop the fuse-plug levee and cause a crevasse through the fuse-plug levee which will gradually widen to include the whole of twenty or more miles of said relief levee if the condition of the Mississippi River so requires for the safety of the remainder of its alluvial valley.

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## VIII.

Prior to the adoption of the Flood Control Act, the Cypress Creek Drainage District, and all of the property owners interested therein whose property is now protected only by said fuse-plug levee, had, and exercised, their legal right of protecting themselves against inundation by raising the present fuse-plug levee during flood times. This right of self-defense has been taken from the plaintiff, and the owners of property within said Cypress Creek Drainage District, by the Flood Control Act.

Paragraph number 120 of the adopted project provides as the key to the entire system of flood control that:

"The United States have control over the Cypress Creek levee and keep it substantially at its present strength and present height" (Document No. 90, p. 28).

Paragraph number 118 of the adopted project further provides that:

"To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade."

## IX.

Plaintiff further relies upon the provision of Section 3 of said Flood Control Act which provides:

"\* \* \* if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified, or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the River are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite

banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

Plaintiff alleges that the levees on the opposite banks of the River from the property on which it has liens have been constructed and raised as hereinbefore described and as directed by law, so that the property on which it has such  
78      liens is now subject to overflow and damage by the break of the fuse-plug levee within the meaning of this Section of said Flood Control Act, again constituting a taking of its property for which plaintiff is entitled to just compensation under the provisions of the Act, as well as under the Fifth Amendment to the Constitution of the United States.

Plaintiff further alleges that by the express provision of Section 2 of said Flood Control Act "no local contribution to the project herein adopted is provided." Prior to the adoption of said Flood Control Act, the plaintiff enjoyed equal protection against flood menace, without discrimination, but the primary purpose of the said Flood Control Act is to protect the balance of the alluvial valley of the Mississippi River by sacrificing the plaintiff's property and the property of others within the Boeuf River spillway similarly situated. Unless, therefore, plaintiff is compensated for all damage by it sustained as herein alleged, then this plaintiff will be forced to contribute its entire damages to the project, notwithstanding said provision of the Act to the contrary.

## X.

The adopted project has destroyed the entire salable value of said lands, and has destroyed the ability of said lands to discharge the tax burden against them due to the said District and to the plaintiff, and has impaired and practically destroyed the full use and enjoyment of said property for all practical purposes. The result of setting apart this area as a floodway or diversion channel and of preventing the escaping of flood waters of the Mississippi River elsewhere, and the intentional dedication of this property as a floodway by said Flood Control Act, has subjected the property to flood menace at any and all times. The uncertainty of the safety of persons living upon said property makes it unwise and unsafe to develop said property agriculturally, or to undertake to use said property at any time. The adopted project has had the effect of casting a cloud on the title of the owners of

79 said land and property and all interests thereto so that the land has been deprived of all reasonable market value therefor, and persons cannot be interested in developing said lands into profitable farms, or to use said lands for any other purpose for which they are fitted, because the Government of the United States has substantially taken possession of the property for a diversion channel or floodway of the Mississippi River. The aforesaid acts have substantially damaged this plaintiff individually as owner of bonds of the District and in its capacity as trustee aforesaid.

### XI.

Plaintiff further alleges that notwithstanding the fact that the Fifth Amendment of the Constitution of the United States provides, " \* \* \* nor shall any person \* \* \* be deprived \* \* \* of property without due process of law, nor shall private property be taken for public use without just compensation " and notwithstanding the provision of said Flood Control Act, "That the United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River," and notwithstanding the further provision of said Act that the "Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights of way which, in the opinion of the Secretary of War, and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States District Court for the District in which the land, easement or right of way is located," no condemnation proceedings of any kind has been commenced against the plaintiff, nor against any other person for the condemnation of the property now owned by said Cypress Creek Drainage District, and no compensation of any kind has been paid or offered to the plaintiff for the taking and/or damage of the property herein involved as aforesaid.

### XII.

80 That on the first day of February, 1916, the Cypress Creek Drainage District duly executed and issued its series of bonds in the aggregate amount of \$700,000.00, numbered from 1 to 785, inclusive, and maturing serially on the first day of August of each year from 1922 to 1946, inclusive, payable at the St. Louis Union Trust Company, in the City of St. Louis, and bearing interest at the rate of five and one-half per cent per annum, of which there are now outstanding \$650,000.00; that Cypress Creek Drainage District, on the 6th day of May, 1916, executed its pledge by which it conveyed to the plaintiff, St. Louis Union Trust Company, for



the security of said bonds, the properties and revenues of the district, including all uncollected assessments levied by the said district on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied thereon, which pledge was duly filed for record in the office of the Recorder of Deeds of Desha County, Arkansas on the 10th day of May, 1916, and duly recorded in Record Book 30, page 286; in the office of the Recorder of Deeds of Chicot County on the 16th day of May, 1916, and duly recorded in Record Book W 2, at page 355; and in the office of the Recorder of Deeds of Drew County, Arkansas, on the 27th day of May, 1916, and recorded in Record Book 22, page 430.

### XIII.

As a further element in the damage sustained as aforesaid plaintiff alleges that the ability of the owners of all of the property in said Boeuf River Floodway has been so destroyed because of the constant menace of floods, that payments of annual installments on the assessed benefits have practically ceased, and the ability of plaintiff to collect has been taken and destroyed. In fact, the entire amount of the value of assessed benefits, or betterments which were placed by law upon the territory of said drainage district has now completely been taken and destroyed. Said entire assessment of benefits was placed by law as a tax burden against the territory of the said drainage district as the measure of increased value to the property because of flood protection and drainage, which has now been completely destroyed by the provisions of the said Flood Control Act which has converted this area into a diversion or second channel of the Mississippi River during flood periods; and these assessed benefits which have been so taken and destroyed constitute the only income or security for the payment of said bonds, and credit was extended by the bondholders to the district solely in reliance upon said assessed benefits which have now been destroyed, and without flood protection the entire drainage system constructed by Cypress Drainage District has been rendered valueless and worthless, and the benefits, for which the property owners bonded their lands, have been completely appropriated, taken and destroyed.

### XIV.

As additional element of damage the plaintiff further alleges that the entire physical drainage system has been rendered worthless and has been appropriated and taken by



the United States Government for a diversion channel and floodway of the Mississippi River. The fuse-plug levee in the natural course of events is predestined to blow out and be destroyed, with no provision of law for its restoration, and when this occurs all of the drainage ditches within the floodway will be washed away, filled with silt, sediments and debris, and the entire physical drainage system will be rendered utterly worthless, to the complete destruction of the entire investment which has been made in said district.

### XV.

This plaintiff cannot now state the exact amount of its damages individually and as trustee caused by the aforesaid acts because it does not know the precise number of acres of land within said District against which assessments and levies of taxes have been made. It will procure and introduce in evidence the necessary data from which its damages can be fixed.

Wherefore this plaintiff, as trustee aforesaid, prays judgment against the defendant for all of the aforesaid unpaid assessments and taxes levied against the plaintiff's, Mrs. Julia Spokenbarger's, said lands, and prays judgment against the defendant in its individual capacity for the proportionate part of said unpaid assessments and taxes as its ownership of \$167,500.00 worth of bonds and unpaid interest thereon bears to the whole of the outstanding bonds and interest thereon of said District.

**BRYAN, WILLIAMS, CAVE &  
McPHEETERS,**  
Attorneys for Plaintiff St. Louis  
Union Trust Company.

Endorsed: "Filed Jan. 6, 1937. Sid B. Redding, Clerk"

83 Separate Petition of St. Louis Union Trust Company as Trustee for Bondholders in a Pledge Instrument and Mortgage Executed by the Red Fork Levee District.

In the United States District Court, Eastern District  
of Arkansas, Western Division.

Mrs. Julia Caroline Spokenbarger, Plaintiff,  
vs.

The United States of America, Defendant.

Comes now the St. Louis Union Trust Company in pursuance of the order of the Court requiring it to appear in this action and to plead, answer or demur in this cause, and states

that it does not own any bonds issued by the Red Fork Levee District which are a lien against the lands of the plaintiff, Julia Caroline Sponenbarger; that it is trustee for bondholders in a pledge instrument and mortgage issued by the Red Fork Levee District pledging assessments made against the lands of said plaintiff, and that it files this its separate petition in this cause as trustee only, having no individual interest in this cause.

This plaintiff further states as follows:

## I.

Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and as such is authorized to accept and execute trusts.

## II.

Red Fork Levee District was created by Act No. 93 of the Acts of Arkansas for the year 1891, and was organized to construct levees, and is composed of the following described lands in Desha County, Arkansas: Silver Lake and Red Fork Townships, and that part of Old River and Wilkerson Townships south of the Arkansas River in Desha County. By Act No. 23 of the Acts of Arkansas, for the year 1917, said district was authorized to levy taxes and issue bonds not to exceed \$100,000.00; said Act empowered the board of levee inspectors of the district to issue a pledge or mortgage on all of its income to secure the payment of such bonds as it might issue. The said Act gives to the holders of the bonds issued by the district a lien, to secure the payment of them, on all of the lands within the district. The said district issued and sold its bonds in the sum of \$100,000.00, dated as of August 1st, 1915, payable serially on August 1st of each year from August 1st, 1916, to August 1st, 1936, inclusive, bearing interest at the rate of 6 percent per annum. To secure the payment of said bonds the district executed a pledge or mortgage to the St. Louis Union Trust Company, as trustee, on all of its uncollected assessments and all assessments that might thereafter be levied by the district, and said pledge was duly recorded. The district had paid \$69,500.00 of the principal of said bonds. The lien and bonds issued by said district is a first and a preferred one upon all of the assessments which were made on the lands, lots and so forth in the said district, or which might thereafter be levied on said lands by its successor. That of said bonds there are now outstanding and unpaid \$30,500.00. That the bonds are in default on the payment of interest due February 1st, 1932, and on the interest subsequent

thereto. The District levied an assessment of 2 cents annually upon the assessed valuation of the lands within the District.

### III.

The Southeast Arkansas Levee District is a quasi-municipal corporation of the State of Arkansas, created by Act No. 83 of the General Assembly of the State of Arkansas for the year 1917, and embraces and includes all of the property formerly embraced in the Red Fork Levee District.

### IV.

After the passage of the Flood Control Act by the Congress of the United States, hereinafter more particularly described, and for reasons hereinafter alleged, property owners within the District, realizing that their lands and property had been so damaged by said Act of Congress as to be worthless, or their values seriously impaired, ceased paying annual taxes to such an extent as to bring about defaults on all of the outstanding bonded indebtedness of the District, causing the inability of the District to meet the annual maturities of principal and interest of said indebtedness.

Whereupon, at the suit of the Trustees for the bondholders of said bonded indebtedness of said District, in the case of Mercantile Commerce Bank & Trust Company, Trustee, Mercantile Commerce National Bank in St. Louis, Trustee, plaintiffs, v. Southeast Arkansas Levee District, defendant, with St. Louis Union Trust Company, Trustee, as Intervenor, being all of the Trustees for all of the bond issues involved, H. Grady Miller was appointed by the United States District Court for the Western Division of the Eastern District of Arkansas, as Receiver of said District.

### V.

The plaintiff alleges that under said Flood Control Act of Congress the United States adopted, and enacted into law, a project for the flood control of the Mississippi River in its alluvial valley, and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, 70th Congress, First Session, which engineering plan is commonly called the "Jadwin Plan." The Act provides for raising the levees of the Mississippi River generally three feet, for improving the carrying capacity of the main chan-

nel to its safe capacity through the provision of specified diversion channels. Among these is the Boeuf Floodway, which will carry excess flood waters from a point below the mouth of the Arkansas River across and over a large portion of the area constituting the Southeast Arkansas Levee District, completely traversing said Levee District to and through the Boeuf River Basin into the backwater area at the mouth of the Red River in the State of Louisiana. The Plan leaves the section of the Mississippi River Levee running from approximately the mouth of Cypress Creek in Desha County, Arkansas, south to approximately Luna Landing, in Chicot County, Arkansas, (being the levee which constitutes an important sector in the eastern protection boundaries of said Southeast Arkansas Levee District), known as the "fuse-plug" levee, at its height on the date of the passage of the Act; but as the levees elsewhere have been, and are to be, raised three and one-half feet or materially strengthened, preventing overflow at other points, the volume of water passing into this diversion channel has been, and will be, greatly increased.

The maximum previous overflow of water into the Boeuf Basin occurred in 1927 and was estimated as 450,000 cubic feet per second. Said Flood Control Act involves an intentional, occasional flooding, damaging and destroying of the lands and property within said District, title to which has been acquired by said District, and of lands and property on which said District holds said statutory lien as its sole 86 and only income for the purpose of discharging its said bonded indebtedness, as the direct consequence of the construction of the entire project (Jadwin Plan) by the Government to relieve the channel of the River in times of high water, all of which was contemplated by the Congress when enacting said Flood Control Act, and constitutes a taking of plaintiff's property for public use for which the Government of the United States is liable to the plaintiff, as upon an implied contract, for such compensation as might have been awarded the plaintiff had condemnation proceedings been instituted by the Government of the United States.

## VI.

Said Flood Control Act provided that a Board to consist of the Chief of Engineers, the President of the Mississippi River Commission, and a civil engineer chosen from civil life, be appointed by the President of the United States, by and with the consent and advice of the Senate, which Board was authorized and directed to consider the engineering dif-



ferences between the adopted project (Jadwin Plan) and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and to recommend to the President such action as such Board might deem necessary to be taken in respect to such engineering differences, and it was provided further that the decision of the President upon all recommendations or questions submitted to him by such Board should be followed in carrying out the project adopted. There were very substantial differences in the plan of the Mississippi River Commission for the Boeuf River Floodway diversion as it affected the Southeast Arkansas Levee District and its property, and the plan of the Army Engineers (Jadwin Plan), so that said District could not know just how its property was to be affected until those engineering differences were adjusted and settled.

Said Special Board created by Section 1 of said Flood Control Act reported to the President of the United States on August 8, 1928, recommending the engineering of the Jadwin Plan (adopted project), and on August 13, 1928, the President of the United States approved "the policy and method of dealing with the problem set out in the report, dated August 8, 1928," and the plan for the first time became definite, certain and fixed as a matter of law, in so far as it affects the Southeast Arkansas Levee District and its property herein involved. Work on the project by the United States Government began immediately on August 13, 1928; funds for the purpose being available, and construction work on this plan of flood control is now approximately 70  
87 percent complete.

## VII.

The Project of flood control as adopted by the Flood Control Act of May, 15, 1928, for which the Government of the United States assumed responsibility, differed from the old flood control system of levees, and levees only, by the deliberate creation of certain diversion channels to be sacrificed for the protection of the balance of the alluvial valley of the Mississippi River. The then-Chief of Engineers, in his report to the Secretary of War, which was submitted by the Secretary of War to the Congress in connection with the Jadwin Plan, which was enacted into law by said Flood Control Act, states that:

"The recommended plan (Jadwin Plan) fundamentally differs from the present project, in that it limits the amount of flood water carried in the main river to its safe capacity, and sends the surplus water through lateral floodways. Its essential features and their functions are:

"Floodways from Cairo to New Madrid, from the Arkansas River through the Tensas Basin to the Red River, and from the Red through the Atchafalaya Basin to the Gulf of Mexico. These will relieve the main channel of the water it cannot carry and lower the floods to stages at which the levees can carry them" (Document No. 90, House of Representatives, Seventieth Congress, First Session, pp. 34).

The Jadwin Plan, as enacted into law by said Flood Control Act, further describes the plan for flood control as it affects the plaintiff's property, which is protected only the "fuse plug" section of the levee immediately below the mouth of Cypress Creek, in Desha County, Arkansas, as follows:

"16. From the mouth of the Arkansas (River) to the Old River, at the mouth of the Red (River) extreme floods cannot be carried between levees of the Mississippi (River) without dangerous increase in their heights. A floodway for excess floods is provided down the Boeuf River, on the west side of the river. Excess water cannot be carried through the section on the east side, since it would be forced back into the main river by the highlands on the east bank below Vicksburg and have to be carried thence for 160 miles between the main river levees to the mouth of the Red River. The entrance to the floodway is closed by a safety-plug section of the levee, at present grade, which is located at Cypress Creek near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi (River), from the Arkansas to the Red, will be raised about three feet. To prevent flood waters from entering the Tensas Basin, except into the floodway during high floods, the levees on the south side of the Arkansas will be strengthened and raised about three feet as far upstream as necessary.

"17. The Section at the head of the floodway will protect the land within the floodway levees against any flood up to one of the magnitude of the 1922 flood. A flood of the magnitude somewhere between that of 1922 and of 1927 will break it, turning the excess water down the floodway, which will carry it safely to the backwater area at the mouth of the Red River." (Parentheses ours.) (Document No. 90, p. 6).

88 Said Jadwin Plan, enacted into law by said Flood Control Act, further recites and the plaintiff alleges:

"The confinement of flood flows by levees has substantially raised the flood heights" (Document No. 90, p. 19).

"96. The confinement of the Mississippi River within levees and the great development of drainage systems in recent years have raised flood stages materially, and this raising has exceeded estimates made in the past. Were it attempted to hold the water within the present levee lines by raising them, river stages are possible as much as \* \* \* 14 feet above the present levee grade at Arkansas City, \* \* \*. The levees now have an average height of about 18 feet. The practical means to meet this situation is to spill the water out of the main leveed channel at selected points when the stages reach the danger point.

"97. The water within the river channel does no damage whatever and it should be kept within the channel as long as possible. The excess must be spilled through safety valves when the volume exceeds the safe capacity of the river. These safety valves consist of one controlled spillway, several relief or fuse-plug levees at present grade and one levee of reduced height, all emptying into natural floodways wholly or partially leveed" (Document No. 90, p. 23).

"The levees generally will be raised about three feet, so that the selected, weaker, relief levees will be at about the elevation of the present levee top and will surely serve their purpose." (Document No. 90, p. 24).

"118. To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., three feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River Bottom, where natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be enclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance, except for the side levees" (Document No. 90, p. 28).

(These side levees, or guide levees, have not yet been constructed by the Government; but plaintiff's property is in the floodway whether said floodway be controlled or uncontrolled, as at the present, and is subject to inundation and destruction whenever the fuse-plug levees gives way to protect the balance of the alluvial valley of the Mississippi River.)

"Due to the increase in flood height by reason of levee construction and drainage, it has been estimated that a stage

over the present top at Cypress Creek might occur in the long run about once in twelve years" (Document No. 90, p. 28).

"121. The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible "follids" (House Document No. 90, p. 28)."

"The draw down from Cypress Creek relief levee into the Boeuf River diversion below makes it possible to protect the lower part of this section of the river from super-floods without excessive levee raising. \* \* \* the average amount that levees are to be raised throughout is approximately three and one-half feet above the present adopted grade". Document No. 90, p. 30).

### VIII.

89 Section 4 of the Flood Control Act provides:

"Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River \* \* \*"

The waters that will flow into the Boeuf Floodway or diversion channel will all be diverted from the main channel of the Mississippi River at a place and in a manner which has never been true before, but which subjects the property against which plaintiff has liens to inundation, damage and destruction whenever a flood stage is reached in the Mississippi River sufficient to overtop or wash away the fuse-plug levee hereinbefore mentioned. The main levees of the Mississippi River have been strengthened and raised so as to now insure the flooding of the said property at predetermined stages of the River. The purpose of leaving the fuse-plug levee hereinbefore mentioned is solely for the purpose of having the water break over same at flood side and flood this diversion channel or floodway in which plaintiff's property is situated. It is an uncontrolled spillway. There is no provision of law for rebuilding the fuse-plug levee when it washes out, but said property will then be left free to the ravages of the escaping waters of the Mississippi River with no protection whatever.

Pursuant to the provisions of said Flood Control Act, from Helena South, the levees on the west bank of the Mississippi River will be maintained at sufficient height to hold all of the flood waters which reach this point from the entire basin of the upper Mississippi River and all of its tributaries, carrying all of this water within the levees to a point about



twelve miles distant from a similar levee on the south bank of the Arkansas River. Through this gap the White River passes into the Mississippi River about midway between the lower end of the levee on the West bank of the Mississippi River above mentioned, and the mouth of the Arkansas River. Lying between these levee ends to the north and west of the twelve-mile gap is located a pool or basin for back-water, some twelve hundred square miles in area, into which will be poured all of the waters of the White River and its watershed, as well as the overflow on the north bank of the Arkansas River for a distance upstream to the locality of Pine Bluff, Arkansas.

90 . It is not contemplated under the present law that any levee will be built along this stretch of the River. When this basin of twelve hundred square miles is filled, its outlet, together with all water coming down the White and Arkansas Rivers, will be discharged through the twelve-mile gap above described.

This combined volume will be added to that in the main stream of the Mississippi River, consisting both of its own water brought down in its own channel from Cairo, Illinois, and also the quantity of water which will have been returned into the Mississippi River, under the present law, from the St. Francis River Basin north of Helena; then for a few miles the comparatively narrow channel of the main levees of the Mississippi River will carry this enormous volume of concentrated flood water until it reaches and is hurled against the fuse-plug levee at the head of the Boeuf River Basin hereinbefore referred to, a comparatively short distance from the Plaintiff's property. The "fuse-plug" levee is so named because in due course, during flood stages of the Mississippi River, this stretch of the levee will break and be washed out when the River reaches the predetermined height fixed by the Army Engineers in similar fashion to what happens when a current of electricity attains a designed voltage sufficient to blow out the fuse in electrical machinery. It is contemplated that this concentration of flood water upon the fuse-plug levees will overtop the fuse-plug levee and cause a crevasse through the fuse-plug levee which will gradually widen to include the whole of twenty or more miles of said relief levee if the condition of the Mississippi River so requires for the safety of the remainder of its alluvial valley.

## IX.

Prior to the adoption of the Flood Control Act the Southeast Arkansas Levee District, and all of the property owners interested therein, including the plaintiff, whose property

is now protected only by said fuse-plug levee, had and exercised their legal right of protecting themselves against inundation by raising the present fuse-plug levee during flood times. This right of self-defense has been taken from the owners of property within said Southeast Arkansas Levee District, by the Flood Control Act.

Paragraph numbered 120 of the adopted project provides as the key to the entire system of flood control that:

91 "The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height" (Document No. 90, p. 28).

Paragraph numbered 118 of the adopted project further provides that:

"To insure that excess water will leave the main river, a fuse-plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., three feet below the new levee grade."

Plaintiff further relies upon the provision of Section 3 of said Flood Control Act, which provides:

"... If, in carrying out the purpose of this Act, it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified, or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the River are subjected to overflow and damage which are not now overflowed and damaged by reason of the construction of levees on the opposite banks of the river, it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands."

Plaintiff alleges that the levees on the opposite banks of the River from the property of plaintiff have been constructed and raised as hereinbefore described and as directed by law, so that the property against which it has liens is now subject to overflow and damage by the breach of the fuse-plug levee within the meaning of this Section of said Flood Control Act, again constituting a taking of its property for which plaintiff is entitled to just compensation under the provisions of the Act, as well as under the Fifth Amendment to the Constitution of the United States.

Plaintiff further alleges that by the express provision of Section 2 of said Flood Control Act "no local contribution to the project herein adopted is provided". Prior to the adoption of said Flood Control Act the plaintiff enjoyed equal protection against flood menace, without discrimination, but the primary purpose of the said Flood Control Act is to protect the balance of the alluvial valley of the Mississippi River by sacrificing the plaintiff's property and the property of others within the Boeuf River spillway similarly situated. Unless, therefore, plaintiff is compensated for all damages by it sustained, as herein alleged, then plaintiff will be forced to contribute its entire damages to the project, notwithstanding said provision of the Act to the contrary.

# XI.

92 The adopted project has destroyed the entire salable value of said lands, and has destroyed the ability of said lands to discharge the tax burden against them due to the said Levee District, and has impaired and practically destroyed the full use and enjoyment of said property for all practical purposes. The result of setting apart this area as a floodway or diversion channel and of preventing the escaping of the flood waters of the Mississippi River elsewhere, and the intentional dedication of this property as a floodway by said Flood Control Act, has subjected the property to flood menace at any and all times. The uncertainty of the safety of persons living upon said property makes it unwise and unsafe to develop said property agriculturally, or to undertake to use said property at any time. The adopted project has had the effect of casting a cloud on the title of the liens of the plaintiff on said lands and property, so that said lands and liens have been deprived of all reasonable market value because the Government of the United States has substantially taken possession of the property for a diversion channel or floodway of the Mississippi River. The aforesaid acts have substantially damaged this plaintiff in its capacity as trustee aforesaid.

Plaintiff further alleges that notwithstanding the fact that the Fifth Amendment of the Constitution of the United States provides: " . . . nor shall any person . . . be deprived . . . of property without due process of law, nor shall private property be taken for public use without just compensation", and notwithstanding the provision of said Flood Control Act: "That the United States shall provide flowage rights for additional destruction flood waters that will pass by reason of diversion from the channel of the Mississippi River", and notwithstanding the further provision of said

Act that the "Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements or rights of way which, in the opinion of the Secretary of War, and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States District Court for the District in which the land, easements or right of way is located", so condemnation proceeding of any kind has been commenced against the plaintiff, nor against any other person for the condemnation of the property now owned by said Southeast Arkansas Levee District, and no compensation of any kind has been paid or offered to the plaintiff for the taking and/or damage of the property herein involved as aforesaid.

93

## • XII.

For further cause of action, the plaintiff alleges that the value of all moneys which have been spent in the past for the construction of levees to protect the area of the Red Fork Levee District from flood waters, to secure which the said District has bonded itself as aforesaid, has now been destroyed and rendered valueless by the adopted project (the (Jadwin Plan). The protection against flood menace and damage for which the Red Ford Levee District bonded the lands within its area has now been taken by the Government of the United States by the condemnation of the area as a diversion channel of the Mississippi River.

## XIII.

This plaintiff cannot now state the exact amount of its damage as trustee caused by the aforesaid acts because it does not know the precise number of acres of land within said District against which assessments and levies of taxes have been made. It will procure and introduce in evidence the necessary data from which its damages can be fixed.

Wherefore this plaintiff, as trustee aforesaid, prays judgment against defendant for all of the aforesaid unpaid assessments and taxes levied against the plaintiff's (Mrs. Sponenbarger's) said lands.

**BRYAN, WILLIAMS, CAVE & Mc  
PHEETERS,**

Attorneys for Plaintiff St. Louis  
Union Trust Company.

Endorsed: "Filed Jan. 6, 1937, Sid B. Redding, Clerk."

94 Answer of the United States of America to the Petition  
of Plaintiff Julia Caroline Sponenbarger.

Comes now the defendant, the United States of America,  
through and by Fred Isgrig, United States District Attorney



for the Eastern District of Arkansas, and herewith files its answer in the above entitled cause, in the manner and form as follows, to-wit:

The defendant admits that the plaintiff is a citizen of the State of Arkansas and of Desha County, as alleged, and that her action is a suit of a civil nature.

The defendant denies that it has any knowledge upon which it could predicate its belief as to whether or not the promises described in plaintiff's petition are owned by the said plaintiff, and therefore asks that the plaintiff be required to make affirmative proof thereof.

The defendant further admits that the Congress of the United States enacted into law an act designed and intended for control of flood waters on the Mississippi River in its Alluvial Valley, being designated as the Act of May 15, 1928, C. H. 569, and further admits that said Act approved and adopted the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, 70th Congress, First Session, and authorized the prosecution of same by the Secretary of War under the supervision of the Chief of Engineers, subject to the exceptions and provisions of Section I of said Act. The defendant, however, denies that said Act or any provision thereof created any contractual obligation in any manner between this plaintiff and the defendant, as in said petition alleged, or in any other manner whatsoever, either expressed or implied, or that it created any obligation on the part of  
95 the United States to pay the plaintiff any sum whatsoever.

The defendant further denies that the passage and approval of said Act constituted "a taking of plaintiff's property" under the Fifth Amendment to the Constitution of the United States, or that the defendant has done any act that had for its purpose or could be construed as a "taking" of plaintiff's property, or has invaded any right, privilege or prerogative of said plaintiff in the free and the untrammelled ownership, enjoyment, use and control thereof, as in said petition alleged, or in any other manner whatsoever, or that the plaintiff has been damaged by the defendant in the sum of Four Thousand Dollars (\$4,000.00) or any other sum whatever.

The defendant specifically denies that it has taken from the plaintiff and all those similarly situated, the right to protect themselves, their lands and their property from excessive flood waters of the Mississippi River or its tributaries, as in

said petition alleged or otherwise, or that the said defendant has taken or in anywise usurped the rights and prerogatives of the said State of Arkansas, or any of its political subdivisions, or of any citizen therein, by any plan of flood control on the Mississippi River or its tributaries or elsewhere. The defendant avers that the plaintiff and others similarly situated, as well as the sovereign State of Arkansas and any political subdivision thereof, have now and ever have had the same rights, powers and privileges of protecting themselves, and their property from flood waters from the Mississippi River or elsewhere, as was ever permitted prior to the enactment of the Flood Control Act of 1928, hereinbefore referred to.

Further answering, the defendant specifically denies each and every allegation of plaintiff's petition that has not heretofore been admitted, qualified or specifically denied.

For further, separate and additional defense to plaintiff's action, the defendant alleges that the 74th Congress of the United States, First Session, adopted and passed Public Act 678, which was duly approved by the President on the 15th of June, 1936, and thereafter became identified as Chapter 548 of June 15, 1936, 49 Stat., which said Act amended and modified the Flood Control Act of 1928, referred to in this answer, in accordance with the recommendations of

96 Section forty-three of the report submitted by the Chief of Engineers to the Chairman of the Committee on flood control, dated February 12, 1935, and printed in House Document on flood control, Document No. 1, 74th Congress, First Session, and as modified and amended by Congress prior to the adoption thereof. That the aforesaid designated as the Eudora Floodway Project, defined in the aforesaid report, was substituted for the so-called Boeuf Floodway of the 1928 project, and which so-called Boeuf Floodway was hereby abandoned as a part of the flood control project and the Eudora Floodway substituted in place thereof. That said Eudora Floodway is a different and distinct engineering design than the so-called Boeuf Floodway, in that the intake of the said Eudora Floodway is 120 miles by the present river course below the confluence of the Arkansas and the Mississippi Rivers, thereby removing all the alleged hazards and speculative dangers and damages to lands at the head of the former Boeuf Floodway, as in plaintiff's petition alleged, the existence of which in truth and in fact the defendant denies ever did exist.

The defendant further denies that the Boeuf Floodway, so-called, was ever established, constructed or brought into being

by the Chief of Engineers or any other agency of the United States Government, or that the same was ever established as a fact, or that any flood waters of the main channel of the Mississippi River was ever diverted by the defendant or any of its servants or agents into the territory designed as the Boeuf Floodway, or that any damage was ever wrought, actually or potentially, to any land or property therein, by the project as defined in the said 1928 Act, including the lands described in the petition as the property of the plaintiff.

The defendant further avers and alleges that, if the land alleged to belong to the plaintiff suffered any damage at any time as in the said petition defined or otherwise, after the passage of the 1928 Flood Control Act, that such damages were speculative, imaginary and consequential in their nature, rather than actual, and denies that the United States is in any manner liable therefor; and if by the passage of said act, a right of action thereunder accrued to the plaintiff, which the defendant denies, such action and all rights thereunder, if any ever existed, the existence of which defendant denies, such action and all claims or rights ceased to exist and abated after the passage and final approval of the aforesaid Act of June 15, 1936.

Wherefore, having fully answered the petition of plaintiff, the defendant herein asks that the relief sought by plaintiff be denied and that her action be dismissed with costs, and for all other just and proper relief which the premises and proof may show the defendant is entitled.

FRED A. ISGRIG,

U. S. Dist. Atty., Eastern Dist. of Ark.

JOHN C. DYOTT,

Special Asst. to the Attorney General.

Endorsed: "Filed Jan. 21, 1937, Sid B. Redding, Clerk."

98 (Order substituting Cypress Creek Drainage District as party Plaintiff in lieu of A. H. Rowell, et al., as Receivers, etc.)

In the United States District Court, Eastern District of Arkansas Western Division.

Mrs. Julia Caroline Sponenbarger, Plaintiff,

No. 7984 vs.

The United States of America, Defendant.

There is presented to the court the motion of the Cypress Creek Drainage District that it be substituted as a party.

plaintiff herein for A. H. Rowell and W. R. Humphrey, as Receivers for the Cypress Creek Drainage District; and the court finds that said Receivers were duly discharged as Receivers of said Cypress Creek Drainage District by an order of this court made and entered on the 9th day of April, 1937, and the affairs of said district were turned back to the Board of Commissioners; and that said motion to substitute should be granted.

It is therefore ordered that the Cypress Creek Drainage District of Desha, Chicot and Lincoln Counties, Arkansas, and its Board of Commissioners, be substituted as party plaintiff herein in lieu of A. H. Rowell and W. R. Humphrey, as Receivers for said District.

Done on this 14th day of May, 1937.

CHARLES B. DAVIS,  
United States District Judge.

Endorsed: "Filed May 14, 1937, Sid B. Redding, Clerk."

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99 Entry of Appearance of Cypress Creek Drainage District.

The Cypress Creek Drainage District of Desha, Chicot, and Lincoln Counties, Arkansas, hereby enters its appearance in this cause, and adopts as its own the defensive pleadings heretofore filed by Alex H. Rowell and Wm. R. Humphrey, as Receivers for the Cypress Creek Drainage District.

CYPRESS CREEK DRAINAGE DISTRICT OF DESHA, CHICOT AND LINCOLN COUNTIES, ARKANSAS.

By DeWitt Poe, Lamar Williamson, Its Attorneys.

Endorsed: "Filed May 17, 1937, Sid B. Redding, Clerk."

100

(Judgment, October 21, 1937.)

United States of America.

Eastern District of Arkansas.

—Division

Be it Remembered, That at a District Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday,



the 18th day of October, Anno Domini, One Thousand, Nine Hundred and Thirty-seven, at the United States Court Room, in the City of Little Rock, Arkansas, the Honorable Charles B. Davis, Judge Designate, presiding, the following proceedings were had, to wit: On October 21, 1937:

Mrs. Julia Caroline Sponenbarger,  
No. 7984 vs.  
United States of America.

This cause having come on regularly for trial on the 10th day of May, 1937, before the Court under direction and authority of the Tucker Act, (Act. Mch. 3, 1887, U. S. C. Title 28); Lamar Williamson, Esq., appearing for the plaintiff, Joseph W. House, Esq., appearing as attorney for intervener, Receiver for Southeast Arkansas Levee District, Thompson, Mitchell, Thompson & Young appearing as attorneys for the intervener, the Mercantile Commerce Bank & Trust Company, Bryan, Cave, Williams & McPheeters appearing as attorneys for the intervener, Franklin American Trust Company and the St. Louis Union Trust Company, Hendrix Rowell, Esq., and DeWitt Poe, Esq., appearing as attorneys for intervener, Receiver for Cypress Creek Drainage District, and Hon. Fred A. Isgrig, United States District Attorney, and Hon. John C. Dyott, Special Assistant to the Attorney General, appearing as attorneys for the defendant, United States of America, and the trial having been proceeded with and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for its consideration and decision, after briefs and arguments of the respective parties had been submitted and considered, and the Court after due deliberation having rendered its decision and filed its findings of fact and conclusions of law, and ordered the judgment to be entered in accordance with said findings and the opinion of the Court rendered in writing:

Now, therefore, by virtue of the law, and by reason  
101 of the findings aforesaid, it is considered, ordered and adjudged by the Court that the plaintiff take nothing by this action and that the defendant go hence without delay, and that the defendant do have and recover of and from the plaintiff its legal and taxable cost in this suit expended.

102 (Motion for New Trial of Mercantile-Commerce Bank and Trust Company, et al.)

Come now Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis

and move to set aside the judgment of the court rendered in the above matter and for a new trial and for ground of said motion state:

That the judgment of the court is based on certain erroneous findings and conclusions of the court, as expressed in the opinion of the court, and, among others, on the following erroneous findings:

### I.

The opinion speaks of movants herein and of others as "intervenor", but also states that they "were made parties upon motion of defendant." An intervenor is, 33 C. J. title "Intervenor",

"A person who voluntarily interposes in an action or other proceeding with the leave of court."

Movants and others brought in on motion of defendant by order of court without their consent are properly styled defendants and the point is important in connection with the details of the judgment.

### II.

The opinion of the court says, among other things:

"The Floodway Act created a board to adjust engineering differences between the adopted project and the plans suggested by the Mississippi River Commission, and to make recommendations to the President. The decision of the President on such matters was to be final. This decision was made on January 10, 1929, in a communication to the Secretary of War, in which he approved the construction of the levees in the Boeuf Floodway."

The facts with reference to the approval of the President are as follows:

There is a document dated August 13, 1928, the whole of which is as follows:

"August 13, 1928.

"The policy and method of dealing with the problem set out in the report, dated August 8, 1928, of the board provided for in section 1 of 'An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes,' approved May 15, 1928, hereto annexed, are approved. The balance of the report is approved excepting and reserving for my future action those parts which con-

template the acquiring of rights in land for constructing spillways and floodways.

CALVIN COOLIDGE,  
President.

There is also the document of January 10, 1929, "quoted in footnote 2 to the opinion. As appears from the face of the documents, they are not addressed to the Secretary of War.

The first document constitutes full adoption by the President of the Floodway Plan, including the Boeuf River Spillway, reserving for future disposition only,

"the acquiring of rights in land for constructing spillways and floodways."

The document of January 10, 1929, recognized that the Boeuf Spillway was already adopted, did not purport to do anything more than decide the specific narrow question reserved in the document of August 13, 1928, and merely said:

"the construction of the protection levees in the Boeuf Basin, as provided for in the adopted project, is approved. Land for rights-of-way for these levees will be secured by condemnation as authorized by law . . ."

There is serious question whether "the acquiring of rights-of-way for land for constructing spillways and floodways" is one of the "engineering differences" which was left to the decision of the President and which consequently he was entitled to reserve in his statement of August 13, 1928, but, in any event, the statement of August 13, 1928, constituted the decision of the President as to the creation of the Boeuf Spillway, leaving open only the detail of the "acquiring of rights in land" for the construction of the protection levees.

The point about "acquiring of rights in land" related to whether or not the federal government or local interests should pay for those which had to be bought and the point had no direct reference to the establishment of spillways and floodways.

### III.

The opinion of the court says, among other things:

"The government did not proceed with the construction of the Boeuf Floodway on account of 'local opposition.'"

The authority for this statement is quoted in Note 4 of the opinion, which reads:

"All parts of the project works in the middle section, except the Boeuf Floodway and the raising of the main river levees adjacent to its head, have in general been completed. Because of local opposition the construction of the Boeuf Floodway levees has not been undertaken."

The statement relates to completion, not start of work. The fact not only is, as stated, that all work of construction in the middle section, including the Boeuf Floodway, had been completed, except with reference to the protection levees and the river levees adjacent to its head, but the construction of the protection levees themselves had gone to the point that condemnation suits had been filed. The fact properly stated, accordingly, is that the government did proceed with the construction of the Boeuf Floodway, but stopped, before completing the construction, at a stage which left the Boeuf Floodway open to all the dangers of a floodway and failed to give even the amount of protection prescribed by law. The fact that there is left temporarily, pursuant to statute, a somewhat longer fuse plug than is necessary or than was prescribed as a permanent construction, and the fact that the absence of the protection levees permits floods to extend over more area than was contemplated, does not lessen  
105 in the least the flood hazard in the Boeuf Floodway and does not lessen to any material extent the amount of damage that will be done by a flood. In general, the fact that the government has not completed its work is immaterial.

#### IV.

The opinion states in effect and then proceeds on the assumption that the Boeuf Floodway has been abandoned. The provisions of law quoted in the opinion, Note 7, as supporting the statement and assumption are:

"that the Boeuf Floodway authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned as soon as the Eudora Floodway, provided for in Flood Control Committee Document No. 1, 74th Congress, 1st Session, is in operative condition and the back protection levee recommended in said document, extending north from the head of the Eudora Floodway shall have been constructed."



At the time of the trial, let alone at the time suit was filed, absolutely nothing had been done on the Eudora Floodway. It was to no extent in operative condition and the back protection levee referred to had not been constructed; construction had not started and it was not even decided that the Eudora Floodway would be adopted for, under provisions of the Act partly quoted in Note 7, the adoption of that floodway is dependent on the following proviso:

"Provided, that no money appropriated under the authority of Section 13 of this Act shall be expended upon the construction of the Eudora Floodway, the Morganza Floodway, the back protection levee extending north from the Eudora Floodway or the levees extending from the head of the Morganza Floodway to the head of and down the east bank of the Atchafalaya River to the intersection of said Morganza Floodway until 75 per centum of value of the flowage rights and rights-of-way for levee foundations, as estimated by the Chief of Engineers, shall have been acquired."

The court will remember that the government witnesses repeatedly developed that appraisers and buyers for the Eudora rights-of-way had not been appointed.

It is true that some place along the line the law has been violated, in that the government started but did not complete the Boeuf River project. Moreover, it amply appeared in the course of the trial that the reason was not local opposition but a War Department switch from the Jadwin Plan to the Markham Plan in advance of authorization by law. However, as stated, the Markham Plan, to the extent it is embodied in the Act of June 15, 1936, does not even purport to be a present abandonment of the Boeuf River Floodway. While the United States has violated the law in not proceeding with reasonable expedition with the completion of the Boeuf Floodway—whether its explanation be local opposition or whatnot—nevertheless the Boeuf Floodway is still in existence and its existence is recognized in the Act of June 15, 1936, in the statement that it "shall be abandoned" later on certain contingencies.

## V.

The opinion says:

"The plaintiff's land is also in the Eudora Floodway, but reliance is not placed upon that fact in this case."

As stated above, there is no Eudora Floodway, the Eudora Floodway had not even been proposed when this suit was filed, and the location of plaintiff's land with reference to

the proposed Eudora Floodway was not an issue in this case. Under the provisions of the law, noted above, there probably never will be a Eudora Floodway.

## VI.

The opinion says:

"During the progress of the execution of the flood control program, the government has undertaken to straighten the channel and increase its discharge capacity, by making a series of 'cut offs', thus eliminating some of the bends. . . .

The engineering witnesses at the trial were in accord on the fact that as a result of this program the flood level of the river in the vicinity of the Cypress Creek Gap was lowered during the flood of February, 1937. But there was disagreement among the engineers as to whether this effect was temporary or permanent, and as to whether this practice was sufficiently free from hazard as to be advisable."

107. No reference is made to the particular evidence which it is thought by the court sustains the last statement. The evidence of plaintiff's engineers was all to the effect that on past experience any beneficial result was only temporary and the cut offs would cause increased trouble until the river ultimately adjusted itself. The government engineers agreed that plaintiff's engineers were correct on the basis of past experience, but said that a new principle or a new practice had been discovered, which, if followed over the years in the future, would lead to a different result. This new principle or new practice the government engineers refused to disclose to plaintiff's engineers, so that plaintiff's engineers might take it into consideration. Not only did they refuse to disclose the new principle or new practice to plaintiff's engineers in advance of the trial, so that it might be given proper consideration, they also refused to disclose it to the court, saying it was not yet ready for publication; they hoped that authority to make it public would soon be given. No more astounding a position has ever been taken in the trial of a case. It is the supposition that the present government engineers are making their little contribution to flood control knowledge, as have innumerable of their predecessors in the past, but their attitude is the customary attitude of the inventor who claims to have discovered perpetual motion. However, even if their present discovery is really revolutionary, they have refused to disclose it to the court and consequently there is no competent evidence that the beneficial effect of the cut offs will be permanent. Admittedly, the beneficial effect depends on continuing work, not provided for.

## VII.

The opinion says:

"If experience in the carrying out of the project dictated that a system of cut off be adopted, with the view of improving the channel of the river, and increasing its discharge capacity, nothing can be more certain than authority so to do may be found in the Jadwin Plan."

108 The facts are that the Jadwin Plan definitely rejects levees high enough to contain the maximum floods of the rivers, it definitely rejects the reservoir plan and it definitely rejects a system of cut off. If the government afterwards should change its mind (it has not yet, notwithstanding the enthusiasm of the particular engineers the government put on the stand to contradict their former Chief, General Jadwin, for cut offs are yet experimental—see Note 8) and decide that the Jadwin Plan was wrong and that increased levees or reservoirs or cut offs are desirable and that floodways should be eliminated, that is the privilege of the government. There always were engineers within and without the War Department who differed from the Jadwin Plan with reference to those items. At the time the Jadwin Plan was adopted it stood to reason that the future would develop better methods of river control than had been known in the past and it may be that a system of cut off, modified from systems previously known, offers promise. While, as noted in Note 11, the plan itself leaves to the Chief of Engineers "the responsibility for the execution of the plan, the details of the design, and location of the engineering work", certainly the fundamental device of floodways cannot be eliminated under the Jadwin Plan and cut offs substituted. It is immaterial that improved methods may have been discovered since the taking of land for a floodway, in accordance with the Jadwin Plan. Certainly, such subsequent discoveries did not and could not prevent the collapse of the market, which followed the adoption of the Jadwin Plan and preceded the discoveries.

## VIII.

The opinion says:

"The nature of the flood control plan, and the progress that has been made in its execution, have been set out in some detail, because it is conceived that this case must turn upon the factual situation."

This statement is incorrect as a matter of law if by  
109 "factual situation" is meant that the court is permitted to judge by hindsight instead of by foresight.

The material question is the market reaction to the prospects of the future and not the accidental facts concerning subsequent floods in the relatively short interval to date. While extreme fears so far may not yet have been realized, they may be realized at any time in the future and, if they should never be realized because of subsequent developments of engineering science, that is immaterial. Using the Portsmouth Harbor cases as an illustration, ordnance and ammunition may be so improved in the future that all fear of a short burst will disappear and land fired over may become preferred for resort purposes because of the spectacle, but that will not alter the fact of a present taking, or the fact of present damage by the taking.

### IX.

The opinion states that a taking, as claimed by plaintiff, was effected by four specified acts. These movants claim that there were two additional acts of equal importance in connection with the taking, to-wit, (a) the proclamation of the President of August 13, 1928, whereby the Boeuf River Floodway was established, and (b) the starting of condemnation suits for the location of the protection levees. The court apparently overlooks the fact that the condemnation suits were started.

### X.

The opinion says:

"The landowners, prior to 1928, had no right to elevate the established grade."

If these movants understand this sentence it expresses a fundamental and complete misunderstanding of the situation. In 1914 the Mississippi River Commission, a purely advisory body without the powers given the War Department in the Flood Control Act, had established a levee grade and section which it had determined was sufficient to contain the maximum floods and which, as a minimum, it set as a goal to which to bring all levees, but there was no prohibition against lower levees or higher levees or levees of less or greater section and consequent strength. For the first time in history, in the Jadwin Plan, the right was taken from landowners to build such levees as they saw fit and the taking was only in connection with the fuse plug sections.

### XI.

The opinion says:

"There is nothing in the Act that restricts the privilege of property owners to participate in a 'flood fight' by supporting the river front levee, when it is endangered."



There is nothing in the Act which would prevent them from maintaining the levee at the 1914 grade and section, but they go to the penitentiary if they raise the grade or enlarge the section. In the analogous Birds Point Fuse Plug the government blew up the levee last year before the river reached the proper crest of the levee and, if the court will here use the formula which it used before (which these movants believe is not a correct formula in either place), "that this case must turn upon the factual situation", the Birds Point Act Shows what the government will do to the Boeuf Fuse Plug in a flood fight when, in the judgment of the War Department, the flood really threatens—in defiance of the right of the landowners to maintain the levee.

## XII.

The opinion says:

"The act of the government in raising the other levees in the vicinity to the 1928 grade, and leaving the prolonged fuse plug section at the 1914 grade, is relied upon as constituting the taking of plaintiff's property."

111. The very essence of the Jadwin Plan is that the fuse plug section shall not merely be left, but shall be forever limited not to exceed the 1914 grade and section on penalty of the penitentiary. See Note 1 for one of the milder statements in the Jadwin Plan to this effect. It is not the leaving of the levee but the prohibition against raising it to equal the grade and section everywhere else established that is relied on as constituting the taking of plaintiff's property—"a fuse plug section \* \* \* must be kept at its present strength (i. e. not in excess of its present strength) and at its present grade, viz (at least) 3 feet below the new levee grade."

## XIII.

The opinion says:

"So the project, in the present stage of execution, is not effective to the end-designed, and has placed no burden upon plaintiff's land that is not equally shared by all other similar land in that vicinity."

It is true that the work is at present incomplete, but it is not true that the work so far done makes no difference. The point however, is that the government took the land when it started work and the particular stage of progress that may have been attained by the time the suit was tried, or that had been attained at the time the suit was filed, is immaterial and it is immaterial if the work is never completed, whether because

112 the government changes its mind or because Congress refuses to appropriate the necessary money. Further, the statement fundamentally mistakes the situation. The fuse plug was sufficient even in 1927 in the sense that it was not breached. The levee across the river went. The raising of the levee across the river, coupled with the prohibition of any raising or strengthening of the fuse plug insures that that will not happen again. The purpose of the Boeuf Floodway is not to protect land for a few miles on either side of the proposed protection levees but is to protect the land across the river and all up and down the river. Granted that the Boeuf Floodway is not confined by protection levees, that is of minor and only partial moment.

#### XIV.

The opinion says:

"\* \* \* there has been no over topping or crevassing of the fuse plug section of the river front levee since the passage of the Act in question."

This is wholly immaterial. For that matter there was not in 1927. The point is that any future break is forced at that point—a wholly artificial situation on the basis of all past experience. The plan may be wise, though artificial, but those benefitted should pay the cost.

THOMPSON, MITCHELL,  
THOMPSON & YOUNG,

By Fred Armstrong, Attorneys for Plaintiff.

Endorsed: "Filed Oct. 29, 1937, Sid B. Redding, Clerk."

#### 113 Separate Motion of St. Louis Union Trust Company For A New Trial.

Now comes the St. Louis Union Trust Company and moves the Court to set aside the judgment heretofore rendered and to grant it a new trial and, as grounds therefore, states:

1. The Court erred in finding and in holding that the Government did not proceed with the construction of the Boeuf Floodway.

2. The Court erred in finding and declaring as a matter of law that there had not been a taking and damaging of plaintiff's lands.

3. The Court erred in refusing to make the findings of fact and the conclusions of law requested by plaintiff.

4. The Court erred in making the findings of fact and conclusions of law requested by the defendant.

**BRYAN, WILLIAMS, CAVE & Mc-PHEETERS,**

Attorneys for Defendant St. Louis Trust Company.

Endorsed: "Filed November 1, 1937 Sid B. Redding, Clerk, U. S. District Court."

114 (Order of Submission of Motion for New Trial of Mercantile-Commerce Bank and Trust Company, et al.)

In The United States District Court for The Western Division of The Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Et Al, Plaintiffs,  
No. 7984. vs.

The United States of America, Defendant.

Now on this 23 day of December, 1937, pursuant to correspondence addressed to the undersigned, it is ordered that the motion of Mercantile-Commerce Bank and Trust Co., and Mercantile Commerce National Bank in St. Louis for new trial in this cause be and same is submitted to the Court upon memorandum brief and argument by movant.

**CHARLES B. DAVIS,**

United States District Judge.

Endorsed: "Filed Dec. 23, 1937, Sid B. Redding, Clerk."

115 (Opinion of District Court on overruling of Motion for New Trial of Mercantile-Commerce Bank and Trust Company, et al.)

In The United States District Court for The Western Division of The Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile Commerce National Bank in St. Louis; and St. Louis Trust Company, Plaintiffs,

No. 7984. vs.

The United States of America, Defendant.

The first specification of the Motion for New Trial relates to the designation of certain of the parties and the form of the judgment.

This action was instituted by Julia Caroline Sponenbarger, as the sole plaintiff. The defendant filed a motion alleging that parties certain and uncertain asserted some lien or claim to the land described in petition, and prayed that an order be entered requiring such parties to be joined as plaintiffs in the action. The Court sustained the motion. In response to the said order the following parties entered their appearance and filed pleadings in the cause:

Mercantile-Commerce Bank and Trust Company, and Mercantile Commerce National Bank in St. Louis, jointly.

St. Louis Union Trust Company, individually, and in its own right, and as trustee for bondholders.

Alex H. Rowell and William R. Humphray, as Receivers of the Cypress Creek Drainage District; the Receivers being discharged, the District entered its appearance.

Grady Miller, as Receiver of the Southeast Arkansas Levee District.

The order of Court directed that these parties become parties plaintiff. They entered their appearance, aligned themselves with the original plaintiff, and some or all of them adopted said plaintiff's petition. They participated in the trial, and submitted the case on the brief and argument of the original plaintiff.

In its opinion, the Court referred to these parties as interveners, as they had, at times, been designated during the trial, to distinguish them from the original plaintiff  
116 in the case. This was an incorrect designation. They were made parties plaintiff by order of the Court, by their respective interests and by their manner of participation in the cause. The opinion is modified to this extent.

The Court reached the conclusion that the original plaintiff was not entitled to recover. Consequently, there was no occasion to make any finding as to whether, or to what extent, the additional parties plaintiff had any claim or lien on the land which was mentioned in the petition. This does not negative the idea that the parties brought into the case by defendant's motion are bound by the judgment.

The judgment entered by the Clerk designated the additional parties as "interveners" following the language of the Court in its opinion filed and did not expressly dispose



of the case as to these additional parties. To correct these errors and mistakes, the Court, on its own motion, doth order that the judgment entered October 21, 1937, be and is hereby amended, nunc pro tunc, as of October 21, 1937, in accordance with amended judgment herewith.

Our view of the other points raised in the motion for New Trial have been heretofore expressed in the opinion on file.

The Motion for New Trial is overruled.

CHARLES B. DAVIS,  
United States District Judge.

Endorsed: "Filed Dec. 23, 1937, Sid B. Redding, Clerk."

117 (Order overruling Motion for New Trial of St. Louis Union Trust Company.)

In The United States District Court for The Western Division of The Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger, Et Al, Plaintiffs,  
No. 7984. vs.

The United States of America, Defendant.

With the consent of movant, the Motion of the St. Louis Union Trust Company for a New Trial submitted to the Court:

Motion of the St. Louis Union Trust Company for a New Trial overruled.

CHARLES B. DAVIS,  
United States District Judge.

Endorsed: "Filed Dec. 23, 1937, Sid B. Redding, Clerk."

118 (Amended Judgment, December 23, 1937.)

United States of America Eastern District of Arkansas, Western Division.

Be It Remembered, That at a District Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 18th day of October Anno Domini, One Thousand, Nine Hundred and thirty-seven at the United States Court Room, in the City of Little Rock, Arkansas, the Honorable Charles B. Davis, Judge designate, presiding, the following proceedings were had, to-wit: On Dec. 23, 1937:

119 Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis; and St. Louis Union Trust Company, Plaintiffs,

No. 7984. vs.

The United States of America, Defendant.

Now on this 23rd day of December, 1937, in order to correct certain errors and mistakes in judgment heretofore entered herein on October 21, 1937, on the Court's own motion, it is hereby Ordered that the aforesaid judgment be amended, nunc pro tunc, as of October 21, 1937, to read as follows:

This cause having come on for trial on the 10th day of May, 1937, before the Court under direction and authority of the Tucker Act (Act of March 3, 1887, 28 USCA 41 (20) ), there appeared the parties plaintiff, Julia Caroline Sponenbarger, by Lamar Williamson, Esq., and E. E. Hopson, Esq., her attorneys; Grady Miller, Receiver for the Southeast Arkansas Levee District, by Joseph W. House, Esq., his attorney; Mercantile-Commerce Bank and Trust Company and Mercantile Commerce National Bank in St. Louis by Fred Armstrong, Esq., of Thompson, Mitchell, Thompson and Young, their attorneys; St. Louis Union Trust Company by Henry Davis, Esq., of Bryan, Williams, Cave and McPheeters, its attorneys; Cypress Creek Drainage District and Alex H. Rowell and William R. Humphrey, Receivers for the Cypress Creek Drainage District by Hendrix Rowell, Esq., and DeWitt Poe, Esq., their attorneys; and party defendant, The United States of America by Fred A. Isgrig, Esq., United States Attorney and John C. Dyott, Esq., Special Assistant to the Attorney General: whereupon, trial of cause before the Court being commenced and concluded, and the issues herein joined, argued and submitted to the Court on briefs; the Court, having duly considered the said issues, doth

120 file herein its opinion and findings of fact and conclusions of law, finding the said issues herein in favor of the defendant and against the plaintiffs.

It is therefore, pursuant to the aforesaid findings of fact and conclusions of law and opinion of this Court, Ordered and Adjudged that plaintiffs, Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Re-

ceivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile Commerce National Bank in St. Louis and St. Louis Union Trust Company take nothing by their suit in this behalf, and that the United States of America, defendant, go hence without day and have and recover of said plaintiffs their costs and charges herein expended, for all of which judgment costs and charges let execution issue upon Praecipe filed therefor by said defendant.

CHARLES B. DAVIS,  
United States District Judge.

121 (Notice of Appeal and Acknowledgment of Service.)

In the United States District Court For the Western  
Division of the Eastern District of Arkansas.

Julia Caroline Sponenbarger, Plaintiff,  
No. 7984. vs. At Law.  
United States of America, Defendant.

Notice of appeal to the defendant, United States of America, and to the honorable Fred A. Isgrig, United States District Attorney, the attorney of record for defendant:

You are hereby notified that the plaintiff, Julia Caroline Sponenbarger, intends to, will, and does hereby appeal from the Judgment of the Court in the above styled cause to the United States Circuit Court of Appeals for the Eighth Circuit.

And there is herewith handed you a copy of the Petition for Appeal, Assignment of Errors, requested form of Order Allowing Appeal, Appeal Bond, Bill of Exceptions including plaintiff's Statement of the Evidence, Citation, and Praecipe as by law provided.

You will take due notice and govern yourself accordingly.

JULIA CAROLINE SPONENBARGER,

Plaintiff,

By E. E. Hopson, McGehee, Arkansas, and  
By Lamar Williamson,

Monticello, Arkansas.  
Attorneys for the Plaintiff.

Service of the foregoing Notice of Appeal and of each of the documents therein referred to is hereby acknowledged this 15 day of Nov., A. D., 1937.

FRED A. ISGRIG,  
United States District Attorney,  
Attorney for the Defendant, the  
United States of America.

Endorsed: "Filed Nov. 29, 1937. Sid B. Redding, Clerk."

122

### Petition For Appeal.

In the United States District Court For the Western  
Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile Commerce National Bank in St. Louis; and St. Louis Union Trust Company, Appellants,

No. 7984. vs.

The United States of America, Appellee.

The above named appellants, feeling aggrieved by the Findings of Fact and Conclusions of Law and the Judgment entered thereon in the above styled action on the 21st day of October, A. D., 1937, and the Amended Judgment rendered the 23rd day of December, 1937, hereby appeal from said Findings of Fact and Conclusions of Law and Judgments to the United States Circuit Court of Appeals for the Eighth Circuit for the correction of the errors more particularly recited in the Assignment of Errors filed by the original plaintiff Julia Caroline Sponenbarger herein on November 29, 1937, which Assignment of Errors are hereby adopted by each and all of the above named appellants.

Wherefore, said appellants pray that their appeal be allowed, that a Citation be issued in accordance with law, and that a properly authenticated transcript of the record, proceedings, and exhibits of the trial be forwarded to the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri.

Your petitioners further pray that this Court, in its order allowing the appeal, fix the amount of bond which they shall



file to pay the costs of this appeal, conditioned as provided by law.

**JULIA CAROLINE SPONENBARGER,**  
Plaintiff and Appellant,  
By E. E. Hopson, McGehee, Arkansas, and  
By Lamar Williamson,  
Monticello, Arkansas,  
her attorneys.

**GRADY MILLER, As Receiver For the**  
Southeast Arkansas Levée District,  
By Joseph W. House,  
Little Rock, Arkansas, and  
By Lamar Williamson,  
Monticello, Arkansas,  
his attorneys.

**ALEX H. ROWELL and**  
**WILLIAM R. HUMPHREY, As Re-**  
ceivers For The Cypress Creek Drain-  
age, District,  
By DeWitt Poe, McGehee, Arkansas, and  
By Lamar Williamson,  
Monticello, Arkansas, and  
By Hendrix Rowell, Pine Bluff, Arkansas,  
their attorneys.

**CYPRESS CREEK DRAINAGE**  
**DISTRICT,**  
By DeWitt Poe, McGehee, Arkansas, and  
By Lamar Williamson,  
Monticello, Arkansas,  
Attorneys.

**MERCANTILE-COMMERCE BANK**  
**AND TRUST COMPANY, and MER-**  
**CANTILE-COMMERCE NATIONAL**  
**BANK IN ST. LOUIS,**  
By Fred Armstrong, Atty. of Thompson  
Mitchell, Thompson & Young, St.  
Louis, Missouri.

**ST. LOUIS UNION TRUST COM-**  
**PANY, Individually and In Its Own**  
Right, and As Trustee For Bond-  
holders In A Pledge and Mortgage  
Executed By The Cypress Creek  
Drainage District,  
By Henry Davis, Atty. of Bryan, Williams  
Cave & McPheeters, St. Louis, Missouri.

ST. LOUIS UNION TRUST COMPANY, Individually and In Its Own Right, and As Trustee For Bondholders In A Pledge and Mortgage Executed by the Southeast Arkansas Levée District,

By Henry Davis, Atty., of Bryan, Williams, Cave & McPheeters, St. Louis, Missouri.

Endorsed: "Filed Jan. 7, 1938, Sid B. Redding, Clerk."

124

Assignment of Errors.

Now comes the plaintiff, Julia Caroline Sponenbarger, the appellant herein, in connection with and as a part of her Petition for Appeal, and files the following Assignment of Errors upon which she will rely on appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to-wit:

1. The Court erred in adjudging that the plaintiff take nothing by her action.
2. The judgment of the Court is contrary to the law.
3. There is no substantial evidence to support the judgment of the Court.
4. The judgment of the Court is contrary to the law and the evidence.
5. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 1.
6. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 2.
7. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 3.
8. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 4.
9. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 5.
10. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 6.
- 125 11. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 7.

12. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 8.

13. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 9.

14. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 10.

15. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 11.

16. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 12.

17. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 13.

18. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 14.

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125a 27. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 23.

28. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 24.

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103. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 99.

104. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 100.

105. The Court erred in refusing to adopt plaintiff's request for Finding of Fact numbered 101.

106. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 1.
- 130 107. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 2.
108. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 3.
109. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 4.
110. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 5.
111. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 6.
112. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 7.
113. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 8.
114. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 9.
115. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 10.
116. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 11.
117. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 12.
118. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 13.
119. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 14.
120. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 15.
121. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 16.
122. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 17.
- 131 123. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 18.
124. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 19.



125. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 20.

126. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 21.

127. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 22.

128. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 23.

129. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 24.

130. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 25.

131. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 26.

132. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 27.

133. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 28.

134. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 29.

135. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 30.

136. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 31.

137. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 32.

138. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 33.

139. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 34.

140. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 35.

141. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 36.

142. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 37.

143. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 38.

144. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 39.

145. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 40.

146. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 41.

147. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 42.

148. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 43.

149. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 44.

150. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 45.

151. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 46.

152. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 47.

153. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 48.

154. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 49.

155. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 50.

156. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 51.

157. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 52.

158. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 53.

159. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 54.

160. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 55.

161. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 56.

162. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 57.

163. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 58.

164. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 59.

165. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 60.

166. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 61.

167. The Court erred in refusing to adopt plaintiff's request for Conclusion of Law numbered 62.

168. The Court erred in adopting each of the separate requests of the defendant for Findings of Fact inconsistent with the Findings of Fact requested by the plaintiff.

169. The Court erred in adopting defendant's request for Finding of Fact numbered 4.

134 170. The Court erred in adopting defendant's request for Finding of Fact numbered 20.

171. The Court erred in adopting defendant's request for Finding of Fact numbered 22.

172. The Court erred in adopting defendant's request for Finding of Fact numbered 25.

173. The Court erred in adopting defendant's request for Finding of Fact numbered 26.

174. The Court erred in adopting defendant's request for Finding of Fact numbered 27.

175. The Court erred in adopting defendant's request for Finding of Fact numbered 29.

176. The Court erred in adopting defendant's request for Finding of Fact numbered 30.

177. The Court erred in adopting defendant's request for Finding of Fact numbered 31.

178. The Court erred in adopting defendant's request for Finding of Fact numbered 32.

179. The Court erred in adopting defendant's request for Finding of Fact numbered 34.

180. The Court erred in adopting defendant's request for

181. The Court erred in adopting defendant's request for Finding of Fact numbered 37.

182. The Court erred in adopting defendant's request for Finding of Fact numbered 38.

183. The Court erred in adopting defendant's request for Finding of Fact numbered 39.

184. The Court erred in adopting defendant's request for Finding of Fact numbered 40.

185. The Court erred in adopting defendant's request for Finding of Fact numbered 41.

135 186. The Court erred in adopting defendant's request for Finding of Fact numbered 42.

187. The Court erred in adopting defendant's request for Finding of Fact numbered 43.

188. The Court erred in adopting defendant's request for Finding of Fact numbered 44.

189. The Court erred in adopting defendant's request for Finding of Fact numbered 45.

190. The Court erred in adopting defendant's request for Finding of Fact numbered 47.

191. The Court erred in adopting defendant's request for Finding of Fact numbered 48.

192. The Court erred in adopting defendant's request for Conclusion of Law numbered 1.

193. The Court erred in adopting defendant's request for Conclusion of Law numbered 2.

194. The Court erred in adopting defendant's request for Conclusion of Law numbered 3.

195. The Court erred in adopting defendant's request for Conclusion of Law numbered 4.

196. The Court erred in adopting defendant's request for Conclusion of Law numbered 5.

197. The Court erred in adopting defendant's request for Conclusion of Law numbered 6.

198. The Court erred in adopting defendant's request for Conclusion of Law numbered 7.

199. The Court erred in adopting defendant's request for

200. The Court erred in adopting defendant's request for Conclusion of Law numbered 9.

201. The Court erred in adopting defendant's request for Conclusion of Law numbered 10.

136 202. The Court erred in adopting defendant's request for Conclusion of Law numbered 11.

203. The Court erred in adopting defendant's request for Conclusion of Law numbered 12.

204. The Court erred in adopting defendant's request for Conclusion of Law numbered 13.

205. The Court erred in adopting defendant's request for Conclusion of Law numbered 14.

206. The Court erred in adopting defendant's request for Conclusion of Law numbered 15.

207. The Court erred in adopting defendant's request for Conclusion of Law numbered 16.

208. The Court erred in adopting defendant's request for Conclusion of Law numbered 17.

209. The Court erred in adopting defendant's request for Conclusion of Law numbered 18.

210. The Court erred in adopting defendant's request for Conclusion of Law numbered 19.

211. The Court erred in adopting defendant's request for Conclusion of Law numbered 20.

212. The Court erred in adopting defendant's request for Conclusion of Law numbered 21.

213. The Court erred in adopting defendant's request for Conclusion of Law numbered 22.

214. The Court erred in adopting defendant's request for Conclusion of Law numbered 23.

215. The Court erred in sustaining the defendant's motion to make additional parties plaintiff.

216. The Court erred in making the Southeast Arkansas Levee District a party to the suit.

217. The Court erred in making Grady Miller as Receiver for the Southeast Arkansas Levee District a party to the suit.



137 218. The Court erred in making the Cypress Creek Drainage District a party to the suit.

219. The Court erred in making the Receivers for the Cypress Creek Drainage District parties to the suit.

220. The Court erred in making Trustees for the bondholders of the Cypress Creek Drainage District and Trustees for the bondholders of the Southeast Arkansas Levee District parties to the suit.

221. The Court erred in holding that "Congress adopted the recommendations of the Chief of Engineers by the passage of the Overton Bill, approved June 15, 1936, 33 U. S. C. A. 702a-1 to 702a-10," inclusive, whereas Congress modified and amended the recommendations of the Chief of Engineers as printed in House Committee on Flood Control Document numbered 1, 74th Congress, 1st Session, and adopted the recommendations of the Chief of Engineers "as so modified."

222. The Court erred in holding that the Boeuf Floodway, as authorized by the Flood Control Act of May 15, 1928, has been abandoned. On the contrary, the Flood Control Act of June 15, 1936, expressly recognizes the continued existence of the Boeuf Floodway for an indefinite time in the future.

223. The Court erred in admitting over the objections and exceptions of the plaintiff evidence relative to the provisions of the Flood Control Act of June 15, 1936, and of the plans authorized or contemplated thereby.

224. The Court erred in admitting, over the objections and exceptions of plaintiff, evidence of cut-offs which have been constructed in the Mississippi River since the alleged taking of plaintiff's property.

225. The Court erred in admitting, over the objections and exceptions of plaintiff, evidence relating to the effect of cut offs in the Mississippi River planned and constructed since the filing of plaintiff's suit.

138 226. The Court erred in referring in the opinion of the Court to the cut-off program.

227. Notwithstanding the Court in its opinion correctly declared: "It must be clear that the original flood control plan did not essentially have as its basis a program of channel straightening by means of cut-offs," the Court erred in further inconsistently stating in its opinion: "If experience in the carrying out of the project dictated that a system of cut-off be adopted with the view of improving the channel

of the river, and increasing its discharge capacity, nothing can be more certain than authority so to do may be found in the Jadwin Plan."

228. The Court erred in stating in its opinion: "The plan adopted was only in outline."

229. The Court erred in stating in its opinion as being applicable to the facts involved in the case at bar: "In order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."

230. The Court erred in declaring as law applicable to this case: "Action on the part of the Government, not directly encroaching upon private property, but which imposes a temporary, occasional, or incidental injury, and impairs its use is regarded as a consequential damage, and does not amount to a taking."

231. The Court erred in declaring as a matter of law applicable in the instant case: "The landowners, prior to 1928, had no right to elevate the established grade" of the fuse plug levee.

232. The Court erred in declaring as a Conclusion of Law that it is immaterial whether or not the property owners have the legal right to raise the elevation of the fuse plug levee during a flood fight, and in stating in the opinion: "But 139. even if it were otherwise, that would not give rise to the contingency out of which plaintiff would become entitled to the relief sought in this case."

233. The Court erred in stating in the opinion: "Consequently, that floodway (Boeuf Floodway) is not now and never has been in an operative condition."

234. The Court erred in holding in its opinion that: "The project, in the present stage of execution, is not effective to the end designed."

235. The Court erred in holding that: "The project, in the present stage of execution, \* \* \* has placed no burden upon plaintiff's land that is not equally shared by all other similar land in that vicinity," meaning lands in that vicinity outside of the Boeuf Floodway.

236. The Court erred in holding in its opinion: "No actual entry of any kind or character has been made thereon," meaning plaintiff's property.

237. The Court erred in holding in its opinion that: "No right acquired or sought to reduce this protection," meaning that the defendant has neither acquired any right to reduce the protection of the plaintiff's property against the flood menace of the Mississippi River, and that the defendant has not sought to reduce the protection of plaintiff's property from flood waters diverted from the main channel of the Mississippi River.

238. The Court erred in holding in its opinion that: "It cannot be successfully contended that plaintiff's land has been appropriated by the defendant, thereby giving rise to an implied contract to compensate the owner."

239. The Court erred in its opinion by directing "that judgment be awarded defendant."

Wherefore, the plaintiff and appellant prays that the judgment in this cause be reversed, and that the cause be  
140 remanded with instructions to the trial court as to further proceeding herein, and for such other and further general, legal and equitable relief to which the plaintiff may be entitled.

JULIA CAROLINE SPONENBARGER,  
Plaintiff and Appellant.  
By Lamar Williamson as her Attorney  
of Record.

Endorsed: "Filed Nov. 29, 1937, Sid B. Redding, Clerk."

141 Order Allowing Appeal.

In The United States District Court for The Western  
Division of The Eastern District of Arkan-  
sas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis; and St. Louis Union Trust Company, Appellants,

No. 7984. vs.

The United States of America, Appellee.

The plaintiffs in the above entitled action, Julia Caroline Sponenbarger, Grady Miller as Receiver for the Southeast

Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile Commerce National Bank in St. Louis; and St. Louis Union Trust Company, having filed herein their Petition for Appeal from the Findings of Fact and Conclusions of Law and Judgment entered thereon on the 21st day of October, A. D. 1937, and the Amended Judgment rendered nunc pro tunc December 23, 1937:

It is ordered and adjudged that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the Findings of Fact and Conclusions of Law and Judgments heretofore entered herein be, and the same is hereby allowed, and that a certified transcript of the record be forwarded to the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri, as by law and the rules of the Court prescribed.

It is further ordered that appellants file a bond in the amount of \$500.00 to pay the costs of this appeal as by law and the rules of the Court provided.

Done and ordered of record this 6 day of January A. D. 1938.

CHARLES B. DAVIS,  
Charles B. Davis, United States  
District Judge.

Endorsed: "Filed Jan. 7, 1938, Sid B. Redding, Clerk."

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(Bond on Appeal.)

Know All Men By These Presents:

That we, Julia Caroline Spokenbarger, Grady Miller as Receiver for the Southeast Arkansas Levee District, Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District, Cypress Creek Drainage District, Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis, and St. Louis Union Trust Company, as principals, and Hartford Accident and Indemnity Company of Hartford, Connecticut, as surety, are held and firmly bound unto the above named defendant in the sum of Five Hundred Dollars (\$500) to which payment, well and truly to be made, we bind ourselves jointly and severally, our heirs, executors, successors, representatives and assigns, respectively, firmly by these presents.

Whereas, the above named Julia Caroline Sponenbarger, Grady Miller as Receiver for the Southeast Arkansas Levee District, Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District, Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis, and St. Louis Union Trust Company, have prosecuted their appeal to the United States Circuit Court of Appeals, for the Eighth Circuit, to reverse the Findings of Fact and Conclusions of Law and the Judgment entered thereon in said above entitled cause on the 21st day of October, A. D., 1937; with Amended Judgment rendered nunc pro tunc December 23, 1937:

Now, Therefore, the condition of this obligation is such that if the above named appellants, Julia Caroline Sponenbarger, Grady Miller as Receiver for the Southeast Arkansas Levee District, Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District, Cypress Creek Drainage District, Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis, and St. Louis Union Trust Company, shall prosecute their appeal to effect and answer all costs if they fail to make good their pleas, then this obligation to be void; otherwise to remain in full force and effect.

Signed and sealed and dated this 4th day of January, A. D., 1937.

**JULIA CAROLINE SPONENBARGER,**  
Plaintiff and Appellant.

By Lamar Williamson,  
Monticello, Arkansas, and  
By E. E. Hopson, McGehee, Arkansas,  
Her Agents and Attorneys.

**GRADY MILLER** as Receiver for  
the Southeast Arkansas Levee District,  
By Joseph W. House,  
Little Rock, Arkansas, and  
By Lamar Williamson,  
Monticello, Arkansas,  
His Attorneys.

**ALEX H. ROWELL**, and  
**WILLIAM R. HUMPHREY** as Receivers for the Cypress Creek Drainage District,



By DeWitt Poe, McGehee, Arkansas, and  
By Lamar Williamson,

Monticello, Arkansas, and  
By Hendrix Rowell, Pine Bluff, Arkansas,  
Their Attorneys.

**CYPRESS CREEK DRAINAGE  
DISTRICT,**

By DeWitt Poe, McGehee, Arkansas, and  
By Lamar Williamson,

Monticello, Arkansas.  
Its Attorneys.

**MERCANTILE-COMMERCE BANK  
AND TRUST COMPANY and  
MERCANTILE-COMMERCE NA-  
TIONAL BANK IN ST. LOUIS,**

By Fred Armstrong, Attorney, of Thomp-  
son, Mitchell, Thompson & Young,  
St. Louis, Missouri.

**ST. LOUIS UNION TRUST COM-  
PANY, Individually and in Its  
Own Right, and As Trustee for  
Bondholders in a Pledge and Mort-  
gage Executed by the Cypress  
Creek Drainage District,**

By Henry Davis, Attorney of Bryan, Wil-  
liams, Cave & McPheeters, St. Louis,  
Missouri.

**ST. LOUIS UNION TRUST COM-  
PANY, Individually and in Its  
Own Right, and As Trustee for  
Bondholders in a Pledge and Mort-  
gage Executed by the Southeast  
Arkansas Levee District,**

By Henry Davis, Attorney of Bryan, Wil-  
liams, Cave & McPheeters, St. Louis,  
Missouri.

**HARTFORD ACCIDENT AND IN-  
DEMNITY COMPANY, of Hart-  
ford, Connecticut, as Surety,**

By (Names not legible),  
Attorney-in-Fact & Resident Agent.

Approved: January 6, 1938.

**CHARLES B. DAVIS,**  
United States District Judge.

Endorsed: "Filed Jan. 7, 1938, Sid. B. Redding Clerk."

## Bill of Exceptions.

(Filed January 10, 1938.)

in the United States District Court for the Western Division of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver for the Southeast Arkansas Levee District; Alex H. Rowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis; and St. Louis Union Trust Company, Appellants,

No. 7984. vs.

The United States of America, Appellee.

Be It Remembered, That on this the 10th day of May, 1937, his cause came on to be heard before the Hon. Charles B. Davis, Judge of the United States District Court for the Eastern District of Missouri, sitting by special assignment, the cause being heard under direction and authority of the Tucker Act (Act of March 3, 1887, Title 28 U. S. C. A., Sec. 1 (20)), the plaintiff Julia Caroline Sponenbarger appearing in person and by her attorneys Lamar Williamson of Monticello, Arkansas, and E. E. Hopson of McGehee, Arkansas; the plaintiff Grady Miller as Receiver for the Southeast Arkansas Levee District appearing by his attorneys Mr. Joseph W. House of House, Moses & Holmes, Little Rock, Arkansas, and Lamar Williamson; plaintiffs Alex H. Rowell and William R. Humphrey as Receivers for the Cypress Creek Drainage District appearing by their attorneys Mr. DeWitt Poe of McGehee, Arkansas, Mr. Hendrix Rowell of Pine Bluff, Arkansas, and Lamar Williamson of Monticello, Arkansas; the plaintiff Cypress Creek Drainage District appearing by its attorneys Mr. DeWitt Poe and Mr. Lamar Williamson; the plaintiffs Mercantile-Commerce Bank & Trust Company and Mercantile-Commerce National Bank in St. Louis appearing by their attorney Mr. Fred Armstrong of the firm of Thompson, Mitchell, Thompson & Young of St. Louis, Missouri; and the plaintiff St. Louis Union Trust Company, individually and in its own right and as Trustee for bondholders in a pledge instrument and mortgage executed by the Cypress Creek Drainage District, appearing by its attorney Mr. Henry Davis of the firm of Bryan, Williams, Kaye & McPheeters of St. Louis, Missouri; and the defendant, the United States of America, appearing by its attorneys the Hon. Fred A. Isgrig, United States District Attorney for the

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Eastern District of Arkansas, of Little Rock, Arkansas, and John C. Dyott, Esq. of St. Louis, Missouri, Special Assistant to the Attorney General.

All parties announcing ready for trial, the following proceedings were had:

Plaintiffs announced their reliance upon the following public documents which were offered in evidence by reference only, meaning thereby that the entire documents were not actually filed but were offered by reference as public documents from which any party to the action might read in evidence or argument any excerpts or quotations desired.

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## Exhibit 1.

Flood Control Act of May 15, 1928; 45 Stat. 534 et seq.; Public No. 391, 70th Congress; S. 3740; Title 33 U. S. C. A. Secs. 702a to 702n, inclusive; from which plaintiff read into the record from sections of said Act upon which she specifically relies, the following:

From Sec. 1. "That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: Provided, That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, . . . is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1937, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinabove provided."



From Sec. 2. "No local contribution to the project herein adopted is required."

From Sec. 4. "The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River."

From Sec. 9. "The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act."

Exhibit 2. Document No. 90, House of Representatives, 70th Congress, 1st Session, December 1, 1927, introduced over objections and exceptions of defendant from which the plaintiff read into the record as evidence from sections of said document upon which she especially relies, the following:

From Sec. 2, p. 3, of said Doc. 90. "The plan is a comprehensive one, . . ."

From Sec. 3. "The recommended plan fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity and sends the surplus water through lateral floodways. Its essential features and their functions are:

"Floodways from . . . the Arkansas River through the Tensas Basin to the Red River . . . These will relieve the main channel of the water it can not carry and lower the floods to stages at which the levees can carry them. . . ."

"Local setting back of the levees in the main river at bottle necks to increase its carrying capacity and reduce its flood heights."

"Greater protection against crevasses by strengthening the levee by reducing flood heights through the increased widths of channel afforded by floodways, spillways, and set-backs and by moderately raising the levees where needed to meet predicted flood stages."

From Sec. 7. "Man must not try to restrict the Mississippi River too much in extreme floods. The river will break any plan which does this. It must have the room it needs, and to accord with its nature must have the extra room laterally. . . . The water which can not be carried in the main channel with the levee at reasonable height must be diverted and car-



ried laterally. \* \* \* As a general setback is not practicable the remainder must be supplied by floodways paralleling the general course of the river."

From Sec. 8. "The plan recommended provides the requisite space for the passage of floods, and levees of adequate strength to withstand them, so that should a flood recur of the magnitude of the flood just experienced, the maximum of record, it would be passed out to the Gulf without danger to life in the alluvial valley, and without damage to property except in the floodways allotted for its passage."

From Sec. 16. "From the mouth of the Arkansas to the Old River, at the mouth of the Red, extreme floods can not be carried between levees of the Mississippi without dangerous increase in their heights. A flood way for excess floods is provided down the Boeuf River, on the west side of the river. \* \* \* The entrance to the flood way is closed by a safety plug section of the levee, at present grade, which is located at Cypress Creek, near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi, from the Arkansas to the Red, will be raised about 3 feet. To prevent flood waters from entering the Tensas Basin, except through the flood way during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary."

From Sec. 17. "The section at the head of the flood way will protect the land within the flood-way levees against any flood up to one of the magnitude of the 1922 flood. A flood of a magnitude somewhere between that of 1922 and of 1927 will break it, turning the excess water down the flood way, which will carry it safely to the backwater area at the mouth of the Red river."

From Sec. 23. "The area in the alluvial valley that would be flooded by the Mississippi River water if there were not protecting works is approximately 30,000 square miles. 149 Under the plan recommended, barring accident, approximately 20,550 square miles will be protected annually. The remaining 9,450 square miles, of which approximately 3,340 square miles is cleared land, will be protected on an average of from 2 years in 3 to 14 years in 15, depending upon its location. The remaining 6,110 square miles are swamp and timber land which is not injured by flood."

From Sec. 29. "The cost of the project is unquestionably justified. It will prevent a repetition of the widespread dis-

aster, human suffering, dislocation of the economic life of the valley, interruption of interstate commerce, and the effect on the general welfare of the Nation, that attended the recent flood. The expenditure would be justified even though such a flood occurs but once in 150 years."

From Sec. 38. "The comprehensive plan now presented"

("Mr. Williamson: The repetition of this statement 'the comprehensive plan' is to show that the project is one plan, and one project, and it covers the entire valley.")

From Sec. 39. "In view of the national aspect of the flood-control problem from the standpoint both of the cause and of the effects of the floods, and in view of the large sums spent in the past by the people of the valley for flood protection, the sacrifices they have made in meeting their allotments, the great losses suffered in the past flood, and the larger expenditures now required, it is believed that the United States should bear a larger proportion of the cost of construction than in the past, and that of the States or local interests be as small as consistent with the results desired."

From Sec. 43. "The Mississippi River is the world's greatest river, combines size with usefulness, and is one of the grandest and most valuable assets of the United States."

From Sec. 45. "Through its aid to drainage, navigation, water supply, power, manufacturing, agriculture, and other incidental uses, it renders vital service to over 40 per cent of the area of the country. Its waters come from 31 States, and, were it not for the levees, would in flood cover 30,000 square miles, a territory greater than many of our States."

From Sec. 46. "Its alluvial valley has a growing population and contains the largest area of the richest land in the United States."

From Sec. 47. "Its worst characteristic is that its floods inflict at times great damage upon the people and property in the alluvial valley of the lower river. They take their toll in life and in damage to property, affecting the inhabitants of the valley and investors, manufacturers, and consumers throughout the country. They interfere with the food supply and the general welfare of the country, with its postal service and transcontinental and other interstate commerce."

From Sec. 56. "The integrity of the levee line is dependent upon the levees being high enough to preclude overtopping by any possible flood. Water higher than provided for

will overflow a sandy earth levee and produce a crevasse with dire consequences. A sudden break or crevasse in the levee line emits a torrent at high velocity. A deep hole is quickly scoured out and a mass of sand is deposited on the adjacent land. The deep gap lets water out of the river until the  
 150 river stage falls below the natural bank. This inundates an area many miles from the river for a long period of time, and replanting of crops has to wait for the water to recede. It is not possible to close the crevasse until the next low-water season, and later secondary rises of the river, which without the crevasse would do no harm, overflow the land back of the levee again and perhaps ruin a second planting."

From Sec. 76. "Levees only.—The confinement of flood flows by levees has substantially raised the flood heights."

From Sec. 77. "Several thousand cross sections of the river measured from time to time do not show any material change in the channel itself. Although the confinement of the river between levees has caused large increases in flood heights, it has not caused as yet any cumulative changes in the elevation of the river bed itself."

From Sec. 80. "Since 'levees only' can not be relied on to produce by scour a channel sufficiently large to care for all floods, such channel can be obtained only by setting back the levees or by raising them. Setting back is shown elsewhere to be impractical. To raise the levees on the Mississippi sufficiently to hold the maximum predicted flood with a 5-foot freeboard would require that they be raised 12 feet at Cairo, 19 feet at Arkansas City, 12 feet at Angola, and 6 feet at New Orleans. An increased section and 5-foot freeboard would be necessary for such high levees. Such a raising is most inadvisable since the levees are now about as high as they should be. Levees of such heights would increase tremendously the hazard from possible crevasses and would involve many foundation difficulties. It is doubtful if such a raising would be practicable. The cost would be \$566,500,000."

From Sec. 88. "Since it is possible to have a stage 14 feet above the present levee top at Arkansas City, the St. Francis reservoirs would not completely solve the problem."

From Sec. 96: "The confinement of the Mississippi River within levees and the great development of drainage systems in recent years have raised flood stages materially and this raising has exceeded estimates made in the past. Were it attempted to hold the water within the present levee lines by raising them, river stages are possible as much as 6 feet



above the present levee grade at Cairo, 14 above the present levee grade at Arkansas City, and from 10 to 13 feet above levee grade below Red River. The levees now have an average height of about 18 feet. The practical means to meet this situation is to spill the water out of the main leveed channel at selected points when the stages reach the danger point."

From Sec. 97. "The water within the river channel does no damage whatever and it should be kept within the channel as long as possible. The excess must be spilled through safety valves when the volume exceeds the safe capacity of the river. These safety valves consist of one controlled spillway, several relief or fuse-plug levees at present levee grade and one levee of reduced height, all emptying into natural floodways wholly or partially leveed."

151 From Sec. 98. "The levees generally will be raised about 3 feet, so that the selected, weaker relief levees will be at about the elevation of the present levee top and will surely serve their purpose."

From Sec. 99. "The plan is economical, adequate, and comprehensive, and provides for the disposal of all water predicted as possible."

From Sec. 109. "The control of the relief levees at the head of the Atchafalaya Basin must be under the authority of the United States. The plan is to maintain them at their present elevations and strength."

From Sec. 117. "Old River to the Arkansas.—The flood of 1927 rose to 60.5 on the Arkansas City gauge. It has been estimated that had it been confined and crevasses not occurred the gauge height would have been 69. The top of the present levee is 60.5. To take care of this flood with proper freeboard would require present levees to be raised about 12 feet. Such an increase in levee height would greatly intensify the disaster resulting from an accidental failure of a levee, besides being inordinately costly. Nor would they be safe, for it has been estimated that floods might come which would produce, if confined, stages of over 74 feet. It is obvious that no attempt should be made to raise levees to such a height. The practical remedy is to raise the levee grade 3 feet on both sides of the Mississippi below the Arkansas River, to strengthen these levees so that they will not fail from causes other than accident or overtopping, and to preclude overtopping by insuring that the water in excess of the capacity of the leveed channel be spilled out near the mouth of the Arkansas."

From Sec. 118. "To insure that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz. 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River bottom, where natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be enclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees. It is unwise to attempt to limit the volume of flow that may possibly enter the floodway to a narrower floodway that might prove of insufficient capacity. A narrower floodway cleared of timber was considered, but the clearing was found to be unwarrantably expensive in first cost and maintenance for the increased efficiency of discharge produced thereby. It will be much better to let the land be gradually cleared as it is developed for use. At some future time, the development of the region may warrant the first cost and maintenance of a cleared floodway of less width."

From Sec. 119. The Boeuf River bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land. Water will not top the Cypress Creek fuse plug levee and go down the floodway until it is so high that it must find an outlet. No flood except that of 1927 has reached such a stage. However, due  
152 to an increase in flood heights by reason of levee construction and drainage, it has been estimated that a stage over the present levee top at Cypress Creek might occur in the long run about once in 12 years."

From Sec. 120. "The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height."

From Sec. 121. "The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible floods."

From Sec. 127. "The St. Francis Basin generally, the city of Helena, and the upper Yazoo Basin on the east, will be protected against the greatest predicted flood and have an ample levee freeboard for a flood equal to that of 1927. These levees will be strengthened as well as raised. The draw



down from the Cypress Creek relief levee into the Boeuf River diversion below makes it possible to protect the lower part of this section of the river from superfloods without excessive levee raising. The floodway between Cairo and New Madrid accomplishes the result desired above. The average amount that levees are to be raised throughout is approximately  $3\frac{1}{2}$  feet above the present adopted grade."

From Sec. 129. "The comprehensive project recommended is intended to control flood waters of the Mississippi River throughout its alluvial valley. In order to do this effectively, levees should be constructed where necessary to prevent the flood water of any one of the great basins of the alluvial valley from flowing into the basin below it, except through the relief or fuse plug levees intended to carry off the excess waters during high floods. The plan proposes the strengthening of the levees on the south side of the Arkansas and Red Rivers and raising them about 3 feet, as far upstream as is necessary for that purpose."

From Sec. 131. "Channel stabilization.—Since the levees within the limits of this project are to be greatly enlarged, they will be much more expensive than heretofore, so something must be done to avoid the frequent moving of them from the proximity of caving banks. \* \* \* A general bank-protection scheme must be carried out. This will consist of revetting banks by proven methods and in addition trying new and cheaper methods to accomplish the same result."

From Sec. 138. "The project is to be completed within 10 years."

From Sec. 139. "The plan herein recommended is general in its scope. It is recommended that the responsibility for the execution of the plan, the details of the design, and location of the engineering works and structures be placed upon the Chief of Engineers under the supervision of the Secretary of War, as is done by acts of Congress in the case of river and harbor improvements."

From Sec. 140.\* "Since the protection and preservation of the flood-discharge capacity of the alluvial valley of the Mississippi River is requisite to the common welfare of the Nation and to the preservation of the many lines of interstate commerce which cross the valley, it should be protected and preserved by similar legislation. The warning can not be too strongly emphasized that unless the flood-discharge capacity provided in the plan herein recommended is preserved, a future great flood will result in a disaster as great as or greater than that experienced this year."

From Sec. 141. "To expedite the acquisition of rights of way for structures, the procedure already authorized by the laws relating to works of improvement of rivers and harbors should be made applicable to flood-control works."

From Sec. 147. "I recommend the adoption and authorization of a comprehensive project for the flood control of the Mississippi River in its alluvial valley and its improvement from the Head of the Passes to the Ohio River as set forth in this document, to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers; the project to include the floodways, spillways, levees, channel stabilization, mapping, etc."

From Sec. 149. "I further recommend that legislation be enacted:—

"(a) Prohibiting any obstruction not affirmatively authorized by Congress to the flood discharge capacity of the alluvial valley of the Mississippi River below Cape Girardeau and providing that it shall not be lawful to build or commence the building of any levee or other structure in said alluvial valley, or in any flood way provided therein unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War. . . .

"(e) Providing that existing laws relating to the acquisition of lands, easements or rights of way needed for a work of river and harbor improvements shall be applicable to the acquisition of lands, easements, or rights of way for flood-control works."

"Mr. Dyott: Now, if the Court please, we move that these sections be stricken as evidentiary matter, for the reason that they are not the best evidence, as seeking to indirectly inject the testimony of the author of that document, without giving the Government any opportunity to cross-examine, that the sections enumerated are the expressions of opinion, any of which cannot possibly bind the Government and which have not been enacted into law; that it is secondary evidence at the best, if any evidence at all and that the sections, if any evidentiary matter, are irrelevant and immaterial and I ask that they be stricken.

"The Court: Overrule the motion.

"Mr. Dyott: Save our exceptions. And just one other objection that the plan as there explained has been abandoned by the Act of Congress in what has been specifically known as the Overton Act.

"The Court: Overrule the motion."

"Mr. Dyott: Save our exceptions."

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Exhibit 3 is the official map of the middle section of the alluvial valley of the Mississippi River showing "plan of the Army Engineers for Flood Control adopted by the Act of May 15, 1928," a public document, the original of which 154 will be transmitted and filed with this transcript.

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Exhibit 4 is a map showing the drainage area of the Mississippi River and its tributaries.

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Exhibit 5 is a quadrangle map showing the location of plaintiff's 40 acres of land with reference to Arkansas City, the Mississippi River, Cypress Creek, and the fuse plug levee.

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Exhibit 6 is Committee Document No. 28, House of Representatives, 70th Congress, 2d session, dated August 8, 1928, a public document, being the Report to the President of the Mississippi River Flood Control Board created by section 1 of the Flood Control Act of May 15, 1928, from which the plaintiff read into the record (over the objections and exceptions of the defendant) the following: o

"Conclusions of the Board. 43. In view of the above, the Board is of the opinion that— \* \* \* (d) The fuse-plug relief levee at existing levee heights provides the best solution of the spillway problem. \* \* \* (h) The adopted project provides a sound engineering plan which, while meeting all the above requirements, is also economical.

"44. The board therefore recommends the adopted project submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, Seventieth Congress, first session."

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Exhibit 7 is Committee Document No. 2, House of Representatives, 71st Congress, 1st Session, entitled "Opinion of the Attorney General in Regard to Certain Provisions of the Mississippi Flood Control Act of May 15, 1928," a public document, from which plaintiff read into the record the following:

"First. We ask Executive consideration and interpretation of section 4 of the Flood Control Act of May 15, 1928.

"We represent that it was the intent of Congress in this section to assure compensation for flowage rights over land embraced within all spillways and floodways and for damage where injury is done to property; also for easements putting additional servitudes on land in the building of spillways, floodways, or other diversion works for flood prevention under the act." (Brief presented to President Hoover by Senators and Representatives from States in the Mississippi Valley, dated May 14, 1928).

The Secretary of War requested an opinion of the Attorney General to which he attached copies of the following letters from the President :

"August 13, 1928.

"The policy and method of dealing with the problem set out in the report, dated August 8, 1928, of the board provided for in section 1 of 'An act for the control of floods on the Mississippi River and its tributaries, and for other purposes,' approved May 15, 1928, hereto annexed, are approved. The balance of the report is approved excepting and reserving for my future action those parts which contemplate the acquiring of rights in land for constructing spillways and floodways.

(Signed) "Calvin Coolidge,  
President."

(Ex. 7, p. 10;)

"The White House,

"Washington, January 10, 1929.

"Supplementing my approval of August 13, 1928, of the report of the board provided for in section 1 of 'An act for the control of floods on the Mississippi River and its tributaries, and for other purposes,' approved May 15, 1928, which approved excepted and reserved for future action those parts of the report which contemplated the acquiring of rights in land for constructing spillways and floodways, the construction of the protection levees in the Boeuf Basin, as provided for in the adopted project, is approved.

"Land for rights of way for these levees will be secured by condemnation as authorized by law, provided that these lands may be purchased, when they can be thus secured at reasonable prices, which shall not in any case exceed two and one-half times the assessed valuation at the present time.

(Signed) "CALVIN COOLIDGE."

(Ex. 7, p. 12;)



And from the conclusion of the Attorney General's opinion, the plaintiff read into the record:

"For the above reasons, I am of the opinion that the project set forth in House Document No. 90, Seventieth Congress, first session, is the legal project to be executed in accordance with the law and that this project is fixed and not subject to review or change by this administration.

"WILLIAM D. MITCHELL,  
Attorney General."

(Ex. 7, p. 16;)

156 Ex. 7-A. SID B. REDDING, testified: I am the Clerk of this United States District Court and have been custodian of all of its records since April 1, 1901.

On July 1, 1929, the United States of America filed a petition for the condemnation of 481.75 acres of land in Chicot County, Arkansas, to be used for guide levee rights-of-way to be used under the provisions of the Flood Control Act of May 15, 1928; upon which the record shows the following court

"Order for Filing Petition

"Now, comes Chas. F. Cole, United States Attorney for the Eastern District of Arkansas and under instructions from the Attorney General of the United States, presents to the Court a petition requesting condemnation of 481.75 acres of land in Chicot County, Arkansas, under the provisions of "An Act for the control of floods of the Mississippi River and its tributaries, and for other purposes," approved May 15, 1928, and the Act of August 1, 1888, (25 Stat. 357).

"It is therefore ordered that the said petition be filed, and the Clerk of this Court issue to the Marshal of the Eastern District of Arkansas notices to be served upon the defendants according to law, returnable twenty days after service, at which time the case will be heard.

"This the 1st day of July, 1929.

"JOHN E. MARTINEAU,  
"United States District Judge."

(Ex. 7-A;)

On July 1, 1929, in said cause, the Court also issued the following

"Order

"On this day is presented to the Court a verified petition showing that there has been filed in this Court by Chas. P.



Cole, United States Attorney for the Eastern District of Arkansas, and A. L. Barber, Special Assistant to the said attorney, a complaint praying for the condemnation of the following described lands located in Chicot County, Arkansas, to be used for levee rights-of-way under the provisions of the Act of May 15, 1928, said lands being described as follows, to-wit: (Here is described one stretch of the guide levees of the Boeuf Floodway).

"And it further appears that considerable time will elapse before a final hearing on said condemnation petition can be had, and it further appearing that the petitioner desires immediately to begin construction of the levee over and upon the lands sought to be condemned, and it further appearing that an appropriation has been made by Congress to pay for said rights-of-way, and that adequate funds are now available for that purpose. And the said petition being considered by the Court and the Court being well and fully advised doth order that the said petitioner, its agents and employees be, and they are hereby authorized and empowered  
157 to enter immediately upon and take full possession of said lands and enter upon the work.

"And it is further ordered that all persons be, and they are hereby enjoined and restrained from interfering with or in any wise obstructing the petitioner, its agents and employees from taking full possession of said lands, and that the Court reserves the right to make further and additional orders as may be necessary in the premises.

"JOHN E. MARTINEAU,  
"United States District Judge."

(Ex. 7-B;)

#### Exhibit 8.

On December 18, 1934, said condemnation suit was dismissed by the following Court order:

"Comes the United States by Fred A. Isgrig, United States Attorney and upon its motion it is ordered that this cause be and the same is hereby dismissed." (Ex. 8;)

#### Exhibit 9.

"Report of Third District Officer Capt. Clarke S. Smith, Corps of Engineers, U. S. A., Mississippi River Commission, on Results of Investigation of Arkansas River Levees and of the Practicability of Diverting Cypress Creek Drainage into Interior Streams," was rejected by the Court. Exceptions saved.

## Exhibit 10.

"United States Department of Agriculture Bulletin No. 198," dated April 21, 1915, entitled "Report upon the Cypress Creek Drainage District, Desha and Chicot Counties, Arkansas," to which is attached "Figure 3," being a "Map of the Cypress Creek Drainage District, Desha and Chicot Counties, Arkansas," prepared by the United States Department of Agriculture as a part of Bulletin No. 198.

The report recites:

"Apparently the only serious defect in the levee system is the gap at the mouth of Cypress Creek. . . . The plan of the Mississippi River Commission made in 1907, provides merely for the diversion of Cypress Creek in order that the gap in the levee might be closed, and makes no provision for the further drainage of Desha County." . . . "Before Desha

County can be developed to any considerable extent, 158 efficient drainage must be obtained. The diversion of Cypress Creek and the closure of the gap in the levee will be the first vital step toward that end, but that will not be sufficient."

The report then recommends the drainage system shown by Figure 3.

Over the objection and exceptions of plaintiff, the Court refused to admit any part of the above exhibit in evidence.

## Exhibit 11.

Mr. Williamson: "In order to systematically present our theory of the case to the Court, we would now like to call the Court's attention to Act 80 of the General Assembly of the State of Arkansas, approved February 25, 1915, which creates the Cypress Creek Drainage District, and offer for the record a short excerpt upon which we rely, as follows:"

From Sec. 3, Act 80, approved February 25, 1915, Arkansas General Assembly:

"The intent and purpose of this Act being to protect the territory described in section 1 hereof from floods from the gap in the Mississippi River levee between Jefferson Lake and Cypress Creek, and to provide a complete and thorough system of drainage for surface water, said board is hereby authorized, empowered and directed to adopt the maps, profiles and other information shown by the survey now on file in the office of the present Board of Directors of said district,

which maps and profiles were made under the supervision of the Bureau of Drainage Investigation of the United States Department of Agriculture; and is authorized, empowered and directed to construct canals Nos. 18, 19, 43 and 81, as shown upon said map marked 'Figure 3,' and is empowered and directed to remove any and all dams and levees which may be located across the projected line of said canals. Said board is hereby directed to extend canal 18 up to the northwest corner of section 19 in township 11 south, range 3 west.

"It being known that in order to construct said canals it will be necessary to remove the levee now standing across the head of Boggy Bayou, in Desha County, it is hereby made the duty of said Board of Directors to construct a levee from what is known as the terminus of the Jefferson Lake levee to a point where the same will intersect and join the levee in the Desha Levee District on the south bank of Cypress Creek; said levee shall be located along the line selected by the United States engineers in charge of the third improvement district of the Mississippi River, and shall be constructed in accordance with the plans and specifications adopted by the Mississippi River Commission for the construction of levees on the Mississippi River. \* \* \*

"If the owners of land in any part of Desha County desire to avail themselves of the lateral canals as shown by said Figure 3, they may do so by organizing sub-districts as provided by the general drainage law of this State, and shall have the right to connect the laterals constructed by them with the main drainage canals, provided said laterals  
159 are constructed according to the plans and specifications of said United States Department of Agriculture."

#### Exhibit 12.

Title 33, U. S. C. A., Sec. 702, excerpts on which plaintiff relies read into the record as follows:

"Mississippi River. Authorization of flood-control work. For controlling the floods of the Mississippi River and continuing its improvement from the Head of the Passes to the mouth of the Ohio River the Secretary of War is hereby empowered, authorized and directed to carry on continuously, by hired labor or otherwise, the plans of the Mississippi River Commission, prior to March 3, 1923, or thereafter adopted, to be paid for as appropriations may from time to time be made by law; and a sum not to exceed \$10,000,000 annually is hereby authorized to be appropriated for that purpose, for a period of six years beginning July 1, 1924.

"How appropriations expended. (a) All money appropriated under authority of this section shall be expended under the direction of the Secretary of War in accordance with the plans, specifications, and recommendations of the Mississippi River Commission as approved by the Chief of Engineers, for controlling the floods and for the general improvement of the Mississippi River, \* \* \*."

"Contributions by local interests to levee work. (b) No money appropriated under authority of this section shall be expended in the construction or repair of any levee unless and until assurances have been given satisfactory to the commission that local interests protected thereby will contribute for such construction and repair a sum which the commission shall determine to be just and equitable but which shall not be less than one-half of such sum as may have been allotted by the commission for such work: Provided, That such contributions shall be expended under the direction of the commission, or in such manner as it may require or approve, \* \* \*."

"(d) No money appropriated under authority of this section shall be expended in payment for any right of way for any levee which may be constructed in co-operation with any State or levee district under authority of this section, but all such rights of way shall be provided free of cost to the United States." \* \* \*

"Upon the completion of any levee constructed for flood control under authority of this section, said levee shall be turned over to the levee district protected thereby for maintenance thereafter; but for all other purposes the United States shall retain such control over the same as it may have the right to exercise upon such completion. (Mar. 1, 1917, c. 144, sec. 1, 39 Stat. 948; Mar. 4, 1923, c. 277, 42 Stat. 1505.)"

"Mr. Williamson: Now, we call attention at this point of the record to Section 408 in Title 33 U. S. Code Annotated, which is one of the sections which the Flood Control Act of May 15, 1928, expressly adopts and makes applicable to the different floodways, and that section reads:

"It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise used in the construction of such work under the control



of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, \* \* \* (Mar. 3, 1899, c. 425, sec. 14, 30 Stat. 1152).’ ”

From Title 33, U. S. C. A., Section 648:

“The jurisdiction of the Mississippi River Commission is extended so as to include that part of the Arkansas River between its mouth and the intersection thereof with the division line between Lincoln and Jefferson Counties, \* \* \* (July 27, 1916, c. 260, sec. 1, 39 Stat. 402.)”

### Exhibit 12-A.

From Report No. 1100, House of Representatives, 70th Congress, 1st session, the official Report from the Committee on Flood Control to the House of Representatives, to accompany S. 3740 (which became the Flood Control Act of May 15, 1928), the plaintiff read into the record the following excerpts:

“Section 4 (referring to the Bill which became the Flood Control Act of May 15, 1928), provides compensation for property used, taken, damaged, or destroyed in executing the project, and for damages to public-service corporations through the necessity of adjusting or relocating properties to conform to the project, with the proviso that benefits resulting from the project may be weighed against damages caused by it. It also provides for the acquisition of lands, easements, and rights of way through condemnation proceedings, and for turning over the States and local interests the title to lands acquired under this section.” (Report No. 1100, supra, p. 4;)

“Of course the physical land itself is not intended to be turned over to the local interests, but only the title thereto, \* \* \*.” (Report No. 1100, p. 5;)

“Payment. Declares principle of local contribution sound, but in view of large expenditures heretofore made by local interests in alluvial valley, no local contribution to project is required.

“United States shall pay just compensation for all rights of way and damages, including expenses, to railroads or others in changing their property.

“Special benefits from flood-control plan shall be considered by way of reducing compensation to be paid.

"Method of Acquiring Property. Secretary of War may acquire lands, easements or rights of way by purchase, donation, or condemnation.

"Condemnation proceedings to be instituted in United States district court.

161 "Court shall appoint three commissioners to appraise land, whose award, when confirmed by court, shall be final." (Report 1100, p. 12;)

Incorporated in this Committee Report in the House of Representatives as a part of the debate is an explanation of the Bill by Senator Jones, the author of the Act, in the Senate, immediately before the Bill was passed unanimously by the United States Senate, as follows:

"Mr. King: Do the limits of cost suggested by the Senator include the cost of the overflow of from a million to two million acres of land and the purchase of rights of way or easements over the same?

"Mr. Jones: Yes; the Mississippi River Commission plan includes in the estimate of \$407,000,000 damages for rights of way, flowage, and so on. The General Jadwin plan submitted to Congress, which estimated the cost to be, I think, about \$290,000,000, differed very materially from the Mississippi River Commission plan in that particular. That accounted for the much lower estimate they originally submitted.

"We have provision in the bill for condemnation of rights of way, flowage rights, and so on. We feel that under the constitutional provision no private property can be taken for public use without compensation. We could not avoid that if we desired to do so. We have put a provision in, which I will explain, as the Senator has asked the question, expressly requiring that benefits shall be offset against damages found. We feel that is as far as Congress could possibly go. If we sought to pass legislation authorizing the taking of private property without compensation, the courts would not uphold such a provision. \* \* \*

"Mr. King: Is this a proposition for the reclamation of lands, or merely for the purpose of controlling the waters of the Mississippi River so that they shall not inundate contiguous territory?

"Mr. Jones: I think I can state that it is for the latter purpose the Senator has mentioned. It is to control the floods of the Mississippi River from Cairo down." \* \* \*

"Mr. King: I would like to ask one other question. Leaving out the tributaries and considering only the work which General Jadwin and other engineers who have given this subject attention think are necessary, what will be the [the] cost?

"Mr. Jones: As I said a moment ago, fundamentally there is but little difference. The Mississippi River Commission estimated the cost of its smaller project at \$407,000,000. General Jadwin estimated the cost of what he originally proposed at something like \$290,000,000. There was a difference between the two plans in one particular of about \$100,000,000. General Jadwin, on what is known as the Boeuf spillway, one of the important parts of this project, estimated only a little over \$7,000,000 to take care of the damages to rights of way and matters like that. In other words, his contention is that there is a natural flowage right there, and that the people have no legal right to claim any damages if the Government floods it. The Mississippi River Commission estimated the damages there as something over \$100,000,000. That accounts really for a hundred million dollars difference between the two plans.

"Mr. King: I confess that I was startled when I was told by a Senator that it might be necessary to submerge at times, and to acquire, therefore, an easement over 2,000,000 acres of land. Those lands heretofore in some sections have not been of very great value, and in other places they have been of great value. There is no doubt that if the Government seeks to condemn them they will have great value. The necessity of the purchase by the Government of 2,000,000 acres of ground, or the purchase of the right to overflow it, will entail an enormous cost; and I was wondering just what proportion of these large estimates being submitted by the Senator was to cover the cost of acquiring lands in fee or easements over the same.

"Mr. Jones: We have to get these rights of way and, as I said, there is a difference of a hundred million between the two plans in the very particular the Senator is talking about. . . . The proposition the Senator has in mind is involved in what is known as the Boeuf floodway, which would be a spillway to divert water from the Mississippi River and flow it, I think, 150 or 160 miles." . . . (Report 1100, p. 26-27;)

163 "Mr. Jones. . . . Mr. President, section 4 provides for just compensation, and is framed on the theory of the constitutional provision that where property is taken for public use it must be paid for. As I said a while ago, we have

provided here that the benefits shall be used as offsets to the damages.

"Mr. Edge: Who assesses those benefits—the commission or a court?

"Mr. Jones: The bill provides for condemnation, of course, by the court, and authorizes the court to appoint a commission of three to determine the damages and assess the benefits. There are some other minor provisions in section 4."

### Exhibit 12-B.

From Document No. 798, House of Representatives, 71st Congress, 3d Session, Vol. 1, being a report dated February 28, 1931, from the Chief of Engineers, United States Army, on review of existing projects for flood control in the alluvial valley of the lower Mississippi River, the plaintiff read the following excerpts into the record:

"It is well to note at this point that past estimates of floods have been much in error by underestimation. The 1927 flood exceeded all previous estimates. Estimates for the future based alone on the limited experience of the past are likely to err but not on the side of safety." (Doc. 798, p. 2;)

"The adopted project assumes that in time of maximum flood over 900,000 cubic feet per second may escape into the Boeuf Basin. 1,500,000 cubic feet per second into the Atchafalaya Basin, \* \* ." (Doc. 798, p. 3;)

"The approved project contemplates more than 900,000 cubic feet per second escaping just below the mouth of the Arkansas, \* \* ."

"No serious objection has been raised to the Bonnet Carré floodway. The Federal Government is paying for the land there." (Doc. 798, p. 6;)

"The levees in the proposed flood ways interfere with the drainage. In the adopted project, it is proposed simply to leave gaps for drainage in the protecting levees at all crossings of drainage lines. Unless these gaps are closed by flood gates, the full benefit of the levees will not be realized; if they are closed by flood gates, natural drainage of the land will require pumpage or diversion when the gates are closed. This feature must be solved in some way more satisfactorily than it is left in the adopted project, and the local interests should have a voice in its solution. The Federal Government should provide levees and flood gates and such additional



ditches as may be necessary and economical for the use of flood gates." (Doc. 798, p. 7-8;)

"The Board of Engineers for Rivers and Harbors, the membership of which has not heretofore been responsible for the adopted project, in its report appended hereto recommends as follows:

"1. That no modification of the adopted project be made at the present time.

"2. That the construction of the side or protection levees in the Boeuf and Atchafalaya Basins be deferred until the question of damages to lands and property between these levees has been determined by the courts." (Doc. 798, p. 13;)

164 "The adopted project differs from previous plans in that it does not attempt to confine all of the flood waters within the main leveed channels. Levees high enough and strong enough for this purpose would be impracticable from an engineering standpoint, would be prohibitive in cost and would greatly increase the flood hazard. In its provision for levees of reasonable length and moderate height, and for allowing flood waters in excess of the safe carrying capacity of the leveed channel to escape through lateral flood ways and spillways, the adopted project is sound. \* \* \* The board is of the opinion that 1 foot freeboard is not sufficient for levees that are to confine extreme floods. There is too much uncertainty as to the exactness of the computation of flood heights, too much risk of failure of a levee with water lapping at it within a foot of its crest, too great a possibility that levees will not be maintained to full height at every point at all times, to pronounce a plan of this kind a safe protection to life and property. The board considers 3 feet above the calculated crest of the superflood as the least height to which the levees should be built if protection against such a flood is to be given." (Doc. 798, p. 25;)

"The escape of flood waters through the Boeuf and Atchafalaya Basins, is an essential feature of any economically feasible plan for the control of floods in the lower Mississippi Valley. The restriction of flow by means of side or protection levees in these basins is not essential to the escape of the flood waters but is advisable for the protection of certain lands, and for the protection of life and property, where the cost is not excessive." (Doc. 798, p. 26;)

"The function of the fuse-plug levees provided by the adopted project at the heads of the Boeuf and Atchafalaya

Basins, is to prevent the flow in the main river below from exceeding the safe carrying capacity of the leveed channel. It is expected that water flowing over the tops of the fuse plug levees will cause crevasses, with the result that the requisite amount of water will promptly escape from the main river. As a safety measure the fuse plug sections have been left with sufficient length to allow the escape over their tops of sufficient water if they should happen not to crevass, but act only as weirs. \* \* \*

"Reduction in height of the fuse-plug levees would result in earlier and more frequent flooding of the lands in the basins. Their complete elimination would mean that these lands would be overflowed approximately every year. Drainage problems would be increased," (Doc. 798, p. 27;)

"At Cypress Creek just below the mouth of the Arkansas, the existing levee is not to be raised and, in extraordinary floods, flood waters at stages exceeding 60.5 on the Arkansas City gage or the crest of the present levee will pass over it and follow their natural course through the Boeuf Basin. With an increase in stage sufficient water will pass through the Boeuf Basin to hold the gage heights at Arkansas City when the crest of the superflood is reached to 62.5. At this time approximately 1,950,000 cubic feet per second will pass down the main river and the remainder through the basin. The momentary peak flow into the Boeuf Basin at the vicinity of Cypress Creek may be 1,250,000 cubic feet per second, the average for about 10 days being about 900,000 cubic feet per second." (Doc. 798, p. 44;)

"The protection levees are not at all essential to the proper functioning of the plan in the adopted project but were included merely to furnish local protection or reclamation." (Doc. 798, p. 47;)

165 "It is worthy of note that all flood projects on the Mississippi which have been based on the last high water have proven insufficient. Predictions indicate that a flood larger than that of 1927 may occur at some future time." (Doc. 798, p. 47;)

"With regard to the adopted project attention has been invited to the protection levees in the Boeuf and Atchafalaya Basins which have been protested by local interests and to the fact that these levees are not essential to the proper functioning of the plan but are merely to afford the maximum amount of local reclamation in the basins which was thought economically justifiable.

"I therefore recommend:

"(a) That no change be made in the project;

"(b) That all works other than the protection levees in the Boeuf and Atchafalaya Basins be pushed to completion."

(Signed) T. H. JACKSON,  
Brigadier General, Corps of Engineers,  
Division Engineers.

October 15, 1930.

(Doc. 798, p. 54;)

### Exhibit 13.

From public document "Hearings before the Committee on Flood Control, House of Representatives, 73d Congress, Second Session," dated February 27, 1934, plaintiff read into the record the following statements of Maj. Gen. Edward M. Markham, Chief of Engineers, United States of America:

"I think I have devoted, since I have been handling this field, I have devoted myself to nothing more assiduously than trying to find what is the solution of the Boeuf Basin. There is not any question about it. It is in a flux condition that somehow should be settled. There are no simplicities in it. It demands patience in order that a great many things shall be schemed and worked out and it has a great deal to do with Federal money to a rather vast extent. For example, I cannot find with our appraisals all through the areas of the Boeuf and Atchafalaya why the Agricultural Department undertook to determine what in fact are the values that have been destroyed by way of these flood confinements, the railroads, roads, and other things that were in that basin—I cannot find that as an appraisal the amount of money involved is less than about \$205,000,000". (Exhibit 13, p. 23;)

"The same thing applies to cases against the United States for land claims in the Bonne Carre spillway. Therefore, I am unable after 6 weeks in studying two reports that are on my desk to conclude what I would dare tell Congress to be the cost of acquiring those spillways. I do not know." (Exhibit 13, p. 24;)

"I greatly sympathize with the Boeuf Basin, really and truly; but the physical facts that can be verified by any intelligent engineer are these: It is perfectly manifest that something like a million cubic feet of water will have to be handled in that valley. It can be loosely said that that river will take within its banks 1,000,000 cubic feet per second; and that over

a million feet has to go out of there whether anybody likes it or not, and it will pass or break the levees of doubtful location; in other words it will break where it will. \* \* \* We, therefore, know that if you pile water below the fuse plug into that lower river you can look for a great disaster, a perfectly plain great disaster. The levees themselves in many of the runs below the Boeuf Spillway will not stand conveniently at the additional heights." (Exhibit 13, p. 24;)

166 "The Boeuf Basin has been put in a very unfortunate situation since the levees below the Boeuf Basin were designed with the theory that we will not permit beyond about 1,800,000 second-feet to pass the fuse plug. We would just as soon take 5,000,000 if we could. We say you cannot. Therefore, as I understand it, it was the conception of the law or of Congress that what we are working to is that there should remain in the system a fuse plug at Boeuf and down below Atchafalaya, and then that water will be taken out of the main stem to the west, as it stands, and I tell you frankly that I will do anything within my power to meet this situation equitably as I can but I can consent to nothing that increases substantially the flow of water below the fuse plug beyond 1,850,000 second-feet, because it courts disaster. \* \* \* In other words, we do not dare fairly and squarely as engineers who are capable—we do not dare to permit this water to pass that fuse plug. Now, that, of course, does not settle your question that should be settled, the extent to which there should be compensation down that valley. I do not know. (Exhibit 13, p. 25;)

W. A. Kelly, Engineer Appraiser of The Federal Land Bank of St. Louis, a civil engineer, representing The Federal Land Bank of St. Louis (Exhibit 13, p. 32;), testified to the Congressional Committee:

"We (The Federal Land Bank of St. Louis) will not make land-bank loans in the Boeuf Basin floodway. \* \* \* Because the flood protection is inadequate and not only because the flood protection is inadequate but because the Boeuf basin floodway project is hanging over their heads and that affects loans seriously, affects their land values so that if we acquired land there we think we would find it very difficult to sell. People are afraid to go in there because they do not know what is going to happen." (Exhibit 13, p. 36;)

#### Exhibit 14.

From Committee Document No. 1, House of Representatives, Committee on Flood Control, 74th Congress, 1st Ses-



sion, "Letter from the Chief of Engineers Transmitting Pursuant to a Resolution of the House Committee on Flood Control dated January 28, 1932, a Supplemental Report on Flood Control in the Alluvial Valley of the Mississippi River which Recommends Certain Extensions and Modifications of the Projects for Flood Control of the Mississippi River and Its Tributaries Set Forth in House Document No. 90, 70th Congress, 1st Session, and Adopted by the Flood Control Act of May 15, 1928," dated February 12, 1935, (submitting to the Congress what later became known as the Markham Plan involved in the Flood Control Act of June 15, 1936—the Overton Bill), plaintiff read into the record the following:

"Under the terms of the Act (Flood Control Act of May 15, 1928), compensation is being paid the owners of lands in the Birds Point-New Madrid Floodway for the excess flood waters to which they are thus to be subjected. In this northern section the levees are nearly completed, and the acquisition of flowage in the Birds Point-New Madrid Floodway is progressing satisfactorily." (Com. Doc. No. 1, p. 3;)

"In the middle section the flood discharges from above may be augmented by a great outflow from the Arkansas and the White Rivers. Levees ranging in height up to 40 feet or more would be necessary to confine the waters of an extreme flood. The adopted plan rejects such works as dangerous, and provides for levees of a height sufficient to carry intermediate floods, allowing for the escape of waters in the greatest floods out of the main river through a designated floodway. The levee at the head of the floodway is, under the plan, to be kept at its prior height and condition to form a fuse plug for the relief of such extraordinary floods. All other levees are to be raised and strengthened so as to afford protection except to the lands in the floodway under such conditions. Water from the extreme floods was to be confined within the floodway by guide levies. Since the hills extend to the river on the east side about midway of this middle section, the floodway is necessarily located through the low lands on the west side." (Exhibit 14, p. 3.)

"To prevent the overflow from the Arkansas River of the developed lands in Arkansas and Louisiana west of the Boeuf Floodway, the levees extending up the Arkansas to the high lands at Pine Bluff on the south side of that river have been raised and strengthened under the provisions of the project." (Exhibit 14, p. 4.)

"All parts of the project works in the middle section except the Boeuf Floodway and the raising of the main river levees

adjacent to its head have, in general, been completed." (Exhibit 14, p. 4.)

"The 1928 project provided for raising levees and for escape of excess flood waters at different locations. In general the levees are now as high as safety and reasonable engineering design permit. The higher the levees the greater is the damage from an accidental crevass." (Exhibit 14, p. 17.)

"The Arkansas and White Rivers emptying into the Mississippi just above Arkansas City, Arkansas, have been known to have a combined simultaneous discharge of over 1,000,000 cubic feet per second. Under 1928 flow conditions the resultant flow, obtained by adding the probable contribution of the White and Arkansas Rivers to the assumed flood arriving from Cairo, if confined by the raising of levees on their existent locations, would produce a stage of about 74½ feet at Arkansas City. To confine the river at such a stage the levees would have had to be raised about 14 feet. Since they were already more than 25 feet high in places, this seemed impracticable and the alternative course was selected of providing for the escape of such waters as could not be carried in the main river between levees of reasonable height. It was decided that an increase of approximately 3 feet in existing levee heights below Arkansas City was about as much as was desirable. This limitation called for the escape during the maximum probable flood of about 1,000,000 cubic feet per second and the topography of the valley required that this escape be on the west side of the river. It was accordingly decided to raise main river levees about 3 feet; to provide for the escape of surplus flow by refraining from the enlargement, above its present grade, of a stretch of the west bank levee line at the head of the Boeuf Basin; . . . " (Exhibit 14, p. 18.)

"The portion of the river levees that was not to be raised has become known as the 'Cypress Creek fuse plug'. Its crest elevation is such that stages which exceed 60½ feet on the Arkansas City gage will overtop it. Data indicated that under 1928 flow conditions in excess of 60½ feet would occur not more often, on an average, than once in 12  
168 years. The amount of water escaping would depend on the size of the flood, reaching a possible maximum of about 1,000,000 cubic feet per second in the so-called 'superflood'. The land in the Boeuf Basin that would be overflowed by the waters topping the fuse plug has been called the Boeuf Floodway. This floodway, comprising about 1,330,000 acres, 25 per cent cleared land, and 75 per cent swamp.

and timber land, was to extend from the fuse plug to Sicily Island Gorge (on Ouachita River at Harrisonburg, 60 miles below Monroe, La.). Passing through the gorge the flood waters were to spread out over Red River backwater area—the territory subject to overflow by reason of the gap in the levee system at the mouth of Red River (Old River).” (Exhibit 14, p. 19.)

“With the exception of the stretches adjacent to each end of the Cypress Creek fuse plug and immediately above Old River, the river levees of the middle section have, in general, been completed to project dimensions.” (Exhibit 14, p. 19.)

“Because of the large discharge from the White and Arkansas Rivers the section of Mississippi River from Arkansas River to Red River probably is the most critical from the viewpoint of flood control. The high stages resulting from combination of floods from the Mississippi, Arkansas, and White Rivers, make it impracticable to completely confine major floods between levees in this section of the river. Any plan for controlling major floods in this section of the river must include two principal elements, namely, discharge by the main main river leveed channels with levees at substantially their present grades and escape of excess water by some route west of the river.” (Exhibit 14, p. 21.)

“The capacity of the main leveed channel of Mississippi River between the mouth of the Arkansas and the entrance to the Eudora Floodway is not sufficient at present to prevent a break in the levees between Arkansas River and Eudora, nor is it possible at present to predict accurately where such a break would occur in a great flood, although experiments indicate that it would probably be on the west side above Arkansas City.” (Exhibit 14, p. 23.)

#### Exhibit 15.

From Report No. 985, House of Representatives, 74th Congress, 1st Session, dated May 23, 1935, to accompany H. R. 7349, a public document, the plaintiff read into the record the following:

“The War Department has the utmost sympathy for an owner whose property is injured without compensation. It believes that such owners deserve equitable treatment and compensation for flowage easements over their lands.

“These are the same conclusions reached by the Committee on Flood Control, after extensive hearings. The sole and

only issue is as to where rests the obligation for compensation. For the reasons heretofore given, as a matter of law and equity, the obligation rests upon the United States." (Exhibit 15, pp. 3-4).

### Exhibit 16.

From "Hearings Before a Subcommittee of the Committee on Commerce, United States Senate, 74th Congress, Second Session," dated January 27, 1936, relative to S. 3531 (The Overton Bill), which later became the Flood Control Act of June 15, 1936, a public document, plaintiff read into the record the following excerpts:

169 Maj. Gen. Edward M. Markham, Chief of Engineers, United States Army:

"It may be pertinent to suggest or point out that there have been reports having to do with conditions of the Eudora as well as the Atchafalaya, the purport of which is that the United States should buy them out and return them to the birds, the muskrats and the forests. I said 'No; that is the lowest possible conception of this matter, and I think that if I were a resident of these States, I would use a shot gun to prevent that.'" (Exhibit 16, p. 36.)

"As to the contention of those who think that the lower valley can be protected within the levees of the main stem, I would state our conclusion that in order to take care of floodwaters there must be taken out of the river a million cubic feet a second. There is no means that we know of holding any such amount of water, except and unless the United States would take up reservoirs throughout the entire country and, for the single purpose of withholding water, expend about \$1,260,000,000. We said to the House Committee last year that the reservoirs proposed for the Arkansas and White Rivers; at I think, an estimated cost of \$126,000,000, could be reckoned to withhold between 330,000 and 365,000 cubic second feet leaving still 700,000 or 650,000 cubic second feet to be removed from the river by floodways. If there is any other answer having to do with protection of the lower valley, we do not know it. We cannot uncover it, and we cannot discover it." (Exhibit 16, p. 37.)

"The approach that I made to the question of compensations had to do with some rational, equitable means of making due compensation without getting the United States into a



mass. of claims, condemnation, and expense, the amount or value of which I certainly could not report to Congress. \* \* \* In reporting upon this measure and in suggesting some amendments, I put my signature to the suggestion for compensation of twice the assessed value in Louisiana, and three times the assessed value in Arkansas, with the theory that that sum of money, in the aggregate—theoretically and practically, I believe—would pay the man who may be flooded once in 15 or 25 years and perhaps ultimately not at all, 80 per cent of what I presume its real value in Louisiana, and approximately the same amount—hit or miss a little bit—75 per cent of what I presume to be the real value in Arkansas.” (Exhibit 16, p. 38.)

“I repeat that a million second-feet must be taken out of that river unless you are going to have more and more disasters. I repeat that if we are to get this river under control, it is by this class of control, by building the levees and by the plan of taking out this water by means of spillways, or as you get reservoirs from year to year, bearing in mind that it is rather unthinkable that you should have a big proportion of them in less than 20 or 30 or more years. I would say to this committee what I said to the House Committee: ‘You must regard your reservoirs, as far as control is concerned, as just so much fat.’” (Exhibit 16, p. 38-39.)

“All I know is that we faced the problem of dealing with a vast volume of water to be taken out of that river, most people having no yardstick whatsoever as to what that volume of water is. We say it is 1,000,000 feet, and, in order to produce a yardstick that anybody can readily understand I would suggest that that is pretty nearly six times all the water that flows over Niagara Falls. It is pretty nearly five times all the water that flows down the St. Lawrence River to the sea; and I suggest, for your consideration, that the Corps of Engineers, being no miracle workers, cannot find the means of taking 1,000,000 cubic feet of water out of the Mississippi River five times the flow of the St. Lawrence River, and do it in any narrow fashion. We have to find the best means and stay with it.” (Exhibit 16, p. 43.)

170 “So far as we know, we are undertaking to pay out nearly the real value of all the lands that will be wet at all, and they have always been wet. There is not anything novel about the lands down in these floodways being wet. They have never failed to be wet. Therefore, the only thing the United States is proposing is that instead of having a sporadic indefinable crevass somewhere—and that is what we have always had in the past—we definitely put it down with

prediction, and pay the flowage for that purpose, and pay nearly the real value of every foot that is traversed by that water in that determined path." (Exhibit 16, p. 44.)

"Senator Caraway. You said it would be about 80 per cent of the value of the land in Louisiana.

"General Markham. We are proposing—I hope generously—to pay for flowage, and bear in mind it is flowage. It is not fee.

"Senator Caraway. Yes; I know.

"General Markham. We are proposing to pay for flowage 80 per cent of what would appear to be the real value.

"Senator Caraway. I understood you to say this morning that that does not take in the land that is overflowed, or anything like that; this is just for the lowage rights.

"General Markham. That is all. It is our privilege to flow these lands, leaving them in the hands of the people to cultivate them between the infrequent periods of flow. For that reason I am going to continue to emphasize the word 'generously'". (Exhibit 16, p. 48.)

"Senator Overton. \* \* \* let me just briefly ask you a few questions in order that the record may be brought up to date as to what progress has been made in executing the adopted plan. \* \* \* The northern section, as I understand it, extends from Cape Girardeau to the Arkansas. \* \* \* Is that work practically complete?

"General Markham. That work is practically complete and I think would take superflood. \* \* \* It would take superflood anyway, because the back levee has been built, and the water would go there.

"Senator Overton. Down to the Arkansas River there is no trouble in confining the water of the Mississippi between the leveed channels; is that correct?

"General Markham. I think that is a fair statement. \* \* \*

"Senator Overton. Let us swing down to the southern section from the latitude of the proposed Morganza floodway down to the Gulf. Is that work practically complete \* \* \*?

"General Markham. I think, in rough language, it is practically complete. \* \* \* It is essentially complete.

"Senator Overton. I want to ask you a few questions in reference to the situation on the south bank of the Arkansas River. The levees on the south bank of the Arkansas will,

of course, as I understand it, have to be maintained so as to prevent any crevass, if possible, because a crevass on the south bank of the Arkansas is likely to undo the good work you do all the way down the Mississippi Valley to the Atchafalaya.

"General Markham. Yes, and they are complete, as indicated by the black portion on the map . . . My understanding is that they are up to full superflood height.

"Senator Overton. What is the possibility of their being any crevass in the levees on the south bank of the Arkansas, in case of a major flood?

"General Markham. We do not see any reason to contemplate their crevassing any more than any other full-height levee.

"Senator Overton. Or even in a superflood, if there is going to be any crevass, the crevass would be more likely to occur somewhere else than on the south bank of the Arkansas?

"General Markham. There is no question about it—south of the Arkansas River on the main line." (Exhibit 16, pp. 49-51.)

"Senator Overton. . . . I want to ask you the direct question, and I think you have already given an unequivocal answer to it: Can floods in the lower Mississippi Valley be controlled successfully without the construction of either the Boeuf or the Eudora floodways?

"General Markham. They cannot be." (Exhibit 16, p. 64.)

171

## Exhibit 17.

From "Hearings before the Committee on Flood Control, House of Representatives, Seventy-Fourth Congress, Second Session, on S. 3531" (the Overton Bill which later became the Flood Control Act of June 15, 1936), dated April 30 and May 1, 1936, plaintiff read in evidence the following excerpts:

Colonel Graves, Corps of Engineers, U. S. A., testified:

"The 1928 act said that the United States shall provide flowage for the additional destructive floodwaters that pass by reason of diversion from the main channel of the Mississippi River, and that puts a burden indirectly on the War Department that they have never been able to carry, because there was not money enough in the appropriation to do any

such thing as that, and it has never been decided by the courts just what that means.

"This bill is drawn so that every man has his constitutional rights in court.

"In this bill we are prohibited from using the appropriations except as directed in this law. The previous law is not repealed and neither is it extended. This bill is not as liberal as that law, and our people felt that we could not properly ask for the repeal of the law, and we simply recommended what they should do. \* \* \*

"Those people have still got their case in court under section 4 of the 1928 act." (Ex. 17, p. 9).

"Mr. Rich. Would you mind defining, so far as your knowledge is concerned, what you think the 1928 act intended?

"Colonel Graves. I think it included a great deal more than has ever been paid for by certain of its provisions. I am not sure that the court will decide it that way because the limit of money authorized made it impossible. That law is not consistent. It says you will do a lot of things, and you have so much money to do them with, and you cannot do them.

"General Markham. I think the confusion has to do with the words 'additional floodwaters.' In this particular case we are taking these floodways and physically, by the work of the United States, directing these additional floodwaters over particular property, and that creates a Federal obligation.

"Mr. Rich. The reason I asked that question was because I know that Colonel Graves has been in the service for a great many years. He is not the youngest fellow we have around here. His knowledge and experience will be worth a lot, and I thought, if he would put that in the record, it would be not only good for the present time but for future generations. \* \* \*

My thought was this: General Markham and Colonel Graves both said that the law is not explicit and definite, and it has not been interpreted by the courts. I thought the experience of these two men was very vital in connection with an interpretation of the 1928 act, and it might be to the advantage of the country generally if they made an expression as to their interpretation of the 1928 act, so far as the law itself was concerned. \* \* \*



"General Markham. We are physically, deliberately putting additional floodwaters down in a certain territory, and thus deliberately creating an obligation for the acquirement of those flowage rights, believing that is the proper course for getting a diversion so that the whole river below will be protected in this, the only way we know how to protect it, confining it to a specific floodway. \* \* \*

"Mr. Main. What would you say as to the desirability of the bill with that project (the Eudora Floodway), taken out?

"General Markham. I think that the protection of the lower valley would be wholly incomplete, that it would remain in jeopardy." (Ex. 17, pp. 10-11).

Explaining the official Map of the Army Engineers for Flood Control adopted by the Act of May 15, 1928, plaintiff's Exhibit 3, General Markham testified: Everything in green on the map, everything other than the white, represents the area flooded in 1927. The 1927 flood was not a superflood. We regard the possibility of a flood down in that river that will carry from 350,000 to 400,000 more second-feet than went down the river in 1927. (Ex. 17, p. 16).

"General Markham. May I point out an analogy that I think is striking here? We have had recently very disastrous floods in Pittsburgh. It is not well known, but it is none the less the fact that the Corps of Engineers, in reporting upon the conditions of run-off and flood possibility in Pittsburgh, stated that Pittsburgh would be likely to be afflicted with a flood at a gage of 46 feet, due to the very thing that we are discussing now, an unfortunate conjunction of circumstances and otherwise, and I think that there were many skeptical people up in that territory that believed that there could be a flood where it would rise to 46 feet, but that is our recorded prediction at Pittsburgh, and, as you know, in this flood it reached a stage of 46.5.

"The lower valley can have precisely, in principle, that very consequence, and as we are dealing with these matters, and as the people down in the valley themselves will tell you, they wanted us to reduce our sights, lower our sights, as against the superflood. That is well known down there, and we won't give them an inch. We say, 'If you are going to be protected down there, you have to be protected against a superflood and not against a mere repetition of 1927', because the record would show a possibility of this possible conjunction or run-off from the various territories.

"We are convinced from our connection with such matters that the lower valley at some stage of the game will in fact be visited by a superflood, just as Pittsburgh was," (Ex. 17, p. 18).

"General Ferguson's (President of the Mississippi River Commission), statement is this: 'No statement made  
173 by me in newspapers was intended to infer that my views on the need of Eudora or other floodways have been changed from those given the House Flood Control Committee in 1935.'" (Ex. 17, p. 47).

### Ex. 17-B.

Act 139 of the Arkansas General Assembly approved February 19, 1923, entitled "An Act in aid of Southeast Arkansas Levee District," was offered in evidence, including the following provisions:

"It is hereby ascertained and declared that all real estate subject to overflow in said district (except the real estate included in the limits of any town or city in said district) is benefited annually to the extent of thirty cents (30c) per acre; and there is hereby levied and assessed against each and every acre of such real estate in the district, outside the limits of any town or city and subject to overflow, a tax of thirty cents (30c) per year. \* \* \*

"The tax annually levied in the foregoing section is a fixed tax; \* \* \*

"The Southeast Arkansas Levee District is hereby authorized to issue its negotiable bonds to the amount of and not exceeding three million dollars, interest payable semi-annually, at a rate not exceeding six per cent per annum. \* \* \*

"\* \* \* and for the purpose of securing the payment of said notes, certificates and bonds, and interest, a lien is hereby charged on all lands, \* \* \* and all other property in said district subject to levee tax paramount to all other liens." (Ex. 17-B; Special Acts of Arkansas, 1923, p. 260).

Plaintiff's land is in this district.

### Exhibit 17-C.

Act 260 of the General Assembly of the State of Arkansas, approved March 10, 1921, entitled "An Act in Aid of Cypress Creek Drainage District in Desha and Chicot Counties," au-

torizes a total bond issue of \$1,800,000, the payment of which is secured by a pledge of the benefits assessed by said district, which benefits are a lien on all real property in the district. Plaintiff's land lies in this district. (Ex. 17-C).

### Exhibit 18.

Act 3 of the Arkansas General Assembly approved April 13, 1934, entitled "An Act to Provide for the Redemption of Lands Lying Within the Southeast Arkansas Levee District and the Cypress Creek Drainage District, etc.,"

174 extending to property owners within said districts the period of redemption from forfeiture and nonpayment of annual assessments to January 15, 1935, recites:

"Whereas, the Congress of the United States has heretofore passed an Act known as the Flood Control Act and said Act provides that a portion of the Southeast Arkansas levees shall be used as a fuse plug, and.

"Whereas, under the plans of the War Department a large portion of the lands lying within the Cypress Creek Drainage District and the Southeast Arkansas Levee District will be used as a spillway, and

"Whereas, no provision has been made by the Government for the payment for said lands so confiscated, and

"Whereas, the work has been rapidly carried on in all sectors under the Flood Control Act excepting within that portion known as the Boeuf River Spillway, and

"Whereas, the War Department plans to make a survey of said territory for the purpose of publishing said plans as to the taking of said lands, and

"Whereas, the people of Southeast Arkansas are unable to borrow money or to pledge their real estate as collateral for the purpose of carrying on business, and the property lying within said contemplated spillway has been ruined by reason of the enactment of said Flood Control Act, Now, Therefore,

"Be It Enacted by the General Assembly of the State of Arkansas:" (Ex. 18).

### Exhibit 19.

Act 103 of the Arkansas General Assembly approved March 6, 1935, extends the period of redemption to such property owners as plaintiff to January 15, 1940, and recites:

"Whereas, the Congress of the United States passed an Act known as the Flood Control Act, approved May 15, 1928; and

"Whereas, by said authority of the United States Government, large areas of land lying within the State of Arkansas have been taken and dedicated as a spillway and/or floodway, and other areas may hereafter be so taken; and

"Whereas, the Government has built levees, and under its right of eminent domain has taken levees, for the purpose of diverting waters over lands heretofore protected from flood waters, and may hereafter build and/or take other levees; and

"Whereas, at the present time Improvement Districts within the State of Arkansas, and the Trustees for Bond Holders, and individual property owners have filed suits against the Government to recover damages, for the taking of their property; and

"Whereas, the taking of such lands and property has destroyed values, and left property owners unable to pay  
175 their state, county and improvement taxes by reason thereof: Now, Therefore: Be It Enacted by the General Assembly of the State of Arkansas:" (Ex. 19).

### Exhibit 19 (2)

Public—738—74th. Congress: "An Act authorizing the construction of certain public works on rivers and harbors, for flood control, and for other purposes," approved June 22, 1936, recites:

"Declaration of Policy. Section 1. It is hereby recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government in co-operation with States, their political subdivisions, and localities thereof; that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood-control purposes are in the interest of the general welfare; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if



the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of the people are otherwise adversely affected.

"Sec. 2. That, hereafter, Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, \* \* \*"

"Sec. 8. Nothing in this Act shall be construed as repealing or amending any provision of the Act entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes", approved May 15, 1928, or any provision of any law amendatory thereof." (Ex. 19 (2)).

#### Exhibit 20.

From the Flood Control Act of June 15, 1936 (Public No. 678-74th Congress) "An Act to amend the act entitled 'An Act for the control of floods on the Mississippi River and its tributaries and for other purposes' approved May 15, 1928" commonly called the Overton Bill, the following excerpts:

"That the Boeuf Floodway, authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned as soon as the Eudora Floodway, provided for in Flood Control Committee Document Numbered 1, Seventy-fourth Congress, first session, is in operative condition and the back-protection levee recommended in said document, extending north from the head of the Eudora Floodway, shall have been constructed." (Ex. 20).

"Provided, that no money appropriated under the authority of this Act shall be expended upon the construction of the Eudora Floodway, the Morganza Floodway, the back protection levee extending north from the Eudora Floodway, or the levees extending from the head of the Morganza Floodway to the head of and down the east bank of the Atchafalaya River to the intersection of said Morganza Floodway until 75 per centum of the value of the flowage rights and rights-of-way for levee foundations, as estimated by the Chief of Engineers, shall have been acquired or options or assurances satisfactory to the Chief of Engineers shall have been obtained for the Eudora Floodway, the Morganza Floodway, and the area lying between said back protection levee and the present front line levees: Provided further, That easements re-

quired in said areas in connection with roads and other public utilities owned by States or political subdivisions thereof shall be provided without cost to the United States upon the condition that the United States shall provide suitable crossings, including surfacing of like character, over floodway guide-line levees in said areas for all improved roads now constituting a part of the State highway system, and shall repair all damage done to said highways within the said floodways by the actual use of such floodways for diversion: Provided further, That when such portion of said rights as to all of said areas shall have been acquired or obtained and when said easements required in connection with roads and other public utilities owned by State or political subdivisions thereof have been provided as hereinabove set forth, construction of said flood-control works in said areas shall be undertaken according to the engineering recommendations of the Report of the Chief of Engineers dated February 12, 1935 (House Committee on Flood Control Document Numbered 1, Seventy-fourth Congress, first session), and the Secretary of War shall cause proceedings to be instituted for the condemnation of the remainder of said rights and easements, as are needed and cannot be secured by agreement, in accordance with section 4 of the Flood Control Act of May 15, 1928: Provided further, That in no event and under no circumstances shall any of the additional money appropriated under the authority of this Act be expended for the acquisition of said 75 per centum of the flowage rights and rights-of-way hereinabove contemplated in excess of \$20,000,000: \* \* \* " (Ex. 20).

#### Exhibit 21.

From Public Document, Circular No. 417, United States Department of Agriculture, entitled "The Farm Real Estate Situation, 1935-36", October, 1936, the excerpt:

"The farm real estate situation during the year 1935-36 has been characterized by the continuation of the trend toward higher farm real estate values, more voluntary transfers and trades, and a smaller number of forced transfers occasioned by delinquency upon farm mortgage indebtedness or farm real estate taxes. \* \* \* The continued rise of farm real estate values brought the Bureau index of estimated average value per acre of farm real estate to 82 percent of the pre-war level." (Ex. 21).

Act 67 of the Arkansas General Assembly approved February 10, 1937, entitled "An Act to Enable the Levee and

Drainage Districts of this State to Comply with the Obligations and Requirements of the Federal Government to Control the Flood Waters of the Mississippi," etc., provides:

"Provided, nothing in this Act shall ever be so construed or applied as to relieve the United States of any liability or responsibility which it has assumed by the passage of the Flood Control Act of May 15, 1928, or the Flood Control Act of June 15, 1936, or any other existing law for the control of floods on the Mississippi River," etc. (Ex. 22, Sec. 2).

"Section 5. The State of Arkansas does hereby consent that the United States of America, the Secretary of War of the United States on behalf of the United States, or any of its agencies thereunto legally authorized, be, and each is hereby fully authorized, empowered and enabled, within this State, to exercise the rights of eminent domain and to obtain and acquire property and property rights, flowage rights, rights of way and servitudes or easements or options therefor in this State, either by voluntary agreements with the owners thereof, or by condemnation proceedings under the laws of the United States in pursuance of authority conferred by law in connection with any program or project of flood control, navigation, reclamation, reforestation, soil preservation, wild life refuge, agricultural development, reservoir, drainage, spillway, floodway or diversion channel for flood waters, and, upon the filing of any such proceedings, shall have the right to take immediate possession thereof to the extent of the interest to be acquired and proceed with such public works thereon as have been authorized by law, provided, that, in the event immediate possession is taken as herein provided, adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto; and provided further, that all such proceedings shall be diligently prosecuted in order that such compensation shall be promptly ascertained and paid." (Ex. 22).

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"Mr. Dyott: I now ask your Honor that the entire documents from which these excerpts have been read may be considered in evidence \* \* \*."

Mr. Williamson: These public documents have been offered in evidence "by reference," meaning that opposing counsel, in argument, before the Court, can quote from any part of any of the documents referred to.

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178 W. M. NEPTUNE, a witness on behalf of the plaintiff, testified:

I live in St. Louis, Missouri. I have actively engaged in the practice of civil engineering for about 33 years. Have been employed in the engineering corps of the Missouri Pacific Railroad for 31 years having prepared myself especially for hydraulic engineering in connection with drainage and flood control work. Since 1909 I have been assigned to that department of the Chief Engineer's office.

As an engineer I have studied the Flood Control Act of May 15, 1928, and the engineering plan thereby adopted described in House Document No. 90. I have a general knowledge of the construction work which has been done by the United States under authority of that Act, commonly called the Jadwin Plan. The lines of the Missouri Pacific Railroad Company extend through the entire alluvial valley of the Mississippi River covered by the Jadwin Plan from Cape Girardeau to the Gulf, making it necessary for us to keep in touch with that work throughout the entire valley.

Approximately 85% to 90% of the work in that levee system had been completed in the Fall of 1934; and approximately 90% to 95% of the system of the main river is completed at the present time.

With reference to the middle section of the Mississippi River, the levee lines on the east of the river have been raised and strengthened to the 1928 grades and sections authorized by the Flood Control Act of May 15, 1928; the levee on the south bank on the Arkansas River has been so enlarged and raised down to Yancopin. From Yancopin south on the west side of the Mississippi River to the vicinity of Lake Village the levee has been left at 1914 grade and section, 31½ feet below the 1928 grade. From Lake Village south on the west side of the Mississippi River the levee has been brought up to 1928 grades and sections. This construction work by the United States has resulted in the creation of a fuse plug levee south of the Arkansas River as contemplated by the Flood Control Act of May 15, 1928.

179 For the first time in the control of the Mississippi River, the Flood Control Act of May 15, 1928, introduced in addition to levees the principal of diversion. Prior to that time the attempt had been made to protect the valley by levees only. It also established a full degree of Federal control over the protection system, which prior to the 1928 Act had been exercised by local interests under the supervision of the Federal Government.



The United States began actual construction of the unified, comprehensive project authorized by the Flood Control Act of May 15, 1928, commonly known as the Jadwin Plan, affecting the middle section of the Mississippi River, January 10, 1929, the date of the approval by the President of the recommendations of a Special Board authorized by section 1 of the Act. The construction work has gone on continuously since the final approval of the plan on January 10, 1929.

I have made surveys, and am personally acquainted with the fuse plug levee as compared with the levees north and south of the fuse plug levee on the west side of the Mississippi River, and as compared with the main stem levee east of the Mississippi River. The fuse plug levee is 3 feet lower and approximately just half as large by volume as those other levees constructed by the United States under the 1928 Flood Control Act.

Plaintiff's 40 acres of land is two miles west of the fuse plug levee at Arkansas City.

Exhibit 24 is a diagrammatic plat showing the location, and illustrating what is meant by the low inferior section of the levee called "the fuse plug levee" indicating how it is intended to function under the Flood Control Act of May 15, 1928.

This fuse plug levee as designed and contemplated by the Flood Control Act of May 15, 1928, is left low so it will overtop and relieve the main river levees of the amount of water which can not be handled between the present levee line at the adopted grade below this section of the river.

The fuse plug levee is from 3 to 3½ feet lower than the new levees which are constructed to the 1928 grade.

In September—October, 1935, we made an actual survey of the fuse plug levee, and prepared a graph which represents the condition of the levee at the time of the filing of the present suit. At that time the weakest point of the fuse plug levee which would most likely crevasse under the stress of a flood was in the vicinity of Cypress Point revetment, about 2 to 3 miles north of the bottle neck in the vicinity of Arkansas City. A bottle neck means where the levee lines are very close together constricting the floodway width of the river to an extreme amount as compared with the width above and below.

Since our survey in 1935, the United States has built a new set-back levee from the northern limits of Arkansas City to Chicora Landing in the vicinity of Possum Fork about 8

miles north of Arkansas City. The point on the fuse plug which is now weakest, and which will be the probable point of crevasse when tested by a major flood is about Lucca Landing; about 2 miles north of this new set-back levee. Through this crevasse the water would go right into the Boeuf Floodway. This is in the section of the levee which is designed to open up into the floodway.

When this suit was filed in 1934, the fuse plug levee I have just described was in such condition that it would be overtopped and breached to provide for the escape of flood waters as was designed and contemplated by the Flood Control Act of May 15, 1928; and that condition still exists. The fuse plug levee has been in such operative condition as contemplated by the Flood Control Act of May 15, 1928, for the past 5 or 6 years.

I have surveyed the plaintiff's land involved in this suit, described as the SW $\frac{1}{4}$  of SW $\frac{1}{4}$  of section 31, Township 12, South, Range 1, west, and am personally familiar with it.

Exhibit 25 is a plat of the topographic survey. The 181 map shows how much the plaintiff's land is below the top of the fuse plug levee—the fuse plug levee showing an elevation of 60.5 feet.

Plaintiff's property is practically in the middle of the entrance of the Boeuf Floodway as designed by the Flood Control Act of May 15, 1928.

I have personally inspected the levee line from Pine Bluff on the south bank of the Arkansas River to Yancopin. For the past 5 or 6 years, and at the time the present suit was filed, the plaintiff's property has been reasonably protected against any future floods from waters escaping from the south bank of the Arkansas River.

The plaintiff's property has been definitely subjected to a different flood hazard from that to which it was subjected at any time prior to the construction work done by the United States pursuant to the provisions of the Flood Control Act of May 15, 1928. The levees on the west side of the river above and below the fuse plug, and the levees on the east side of the Mississippi River, and the levee on the south bank of the Arkansas River have all been raised about 3 feet or more above the grade line of the low fuse plug levee. Major floods will undoubtedly overtop this low-line levee and put the spillway and floodway into operation and release the waters to pass over the Sponnenbarger property into the floodway. This definitely locates the flood menace and make certain during major floods the release of the necessary flood

waters onto this property, and in close proximity to it. Heretofore there was a possibility of overflows at points remote from this property. Now it is very definite that such overflows in major floods will come at points close to this property.

182 The word "diversion" used in the Flood Control Act of May 15, 1928, I understand to mean the taking water out of the main channel of the Mississippi and passing it laterally into a detour or route around the main channel in order to handle the amount of water in excess of the capacity of the levee system below the point of diversion. At the time the present suit was filed, and since, additional destructive flood waters will pass over the plaintiff's property by reason of diversion from the main channel of the Mississippi River, overtopping the fuse plug levee at gages somewhere around 59 feet on the Arkansas City gage as shown by our survey and profile of that low levee line.

In order for levees along the Mississippi River to hold the project flood contemplated by the Act of May 15, 1928, the fuse plug levee in the vicinity of Arkansas City would have to be raised approximately 19 feet. If the flood of 1927 had been confined in the main channel of the river by levees at their present location the water would have reached a stage of approximately 69 feet along the fuse plug levee at Arkansas City. In its present condition the fuse plug levee would hold water only to a stage of 59 feet.

A diversion channel on the west side of the Mississippi River in the middle section is a specific requirement of the 1928 Act, and is absolutely necessary for flood control under the provisions of that Act. The levee grades below the suggested diversion approved and adopted under the 1928 Act are not sufficient to carry the amount of water of a 1927 confined flood.

If a flood crest in the Mississippi River exceeds the present height of the fuse plug levee at its weakest and lowest point the levee would be overtopped and would crevasse and would start to flood through the floodway and diversion. That would take place on this property and the head of the floodway with full crevasse effect. The release of a volume of water which has been held up against the levee some 20 feet deep on empty ground would result in destructive velocity with damage to the property in the head of the diversion section. Plaintiff's land is less than a mile from the fuse plug levee at the closest point. Her land is about 2½ miles from the fuse plug levee at Arkansas City.

Her land is 8 miles from the weak section of the fuse plug levee at the upper end of the new set-back levee in the vicinity of Possum Fork.

When the fuse plug levee is overtopped the water in the river will stand 20 feet above the elevation of plaintiff's land less than a mile away.

The fuse plug levee can not be safely overtopped to any depth without a crevasse being reasonably certain. When a crevasse does occur the levee will probably wash away down to the natural level, and more than likely it will scour below the natural elevation of the ground forming "blue holes" to a minimum depth of 30 to 40 feet, although they might exceed that depth considerably.

No part of this fuse plug levee breached or crevassed during the 1927 flood. Crevasses in the Arkansas River levee and crevasses on the east bank of the Mississippi River upstream from Arkansas City relieved the stages in the river to such an extent that the fuse plug levee was not overtopped. The crevasse in Mississippi in 1927, opposite the fuse plug levee, discharged 500,000 second-feet or more of water.

The soil in Mississippi is light and sandy as compared with heavy buckshot soil on the Arkansas side. Levees of equal grade and section in Arkansas and Mississippi along the fuse plug area would give the Arkansas property a distinct advantage in a flood fight on account of the sandy soil and seepage on the Mississippi side of the river.

Any flood beyond that of a magnitude of around 30% less than the 1927 flood, of the type of the 1927 flood, would overtop and crevasse the fuse plug levee. Any flood beyond the magnitude of the flood of 1927 less the amount of water which passed out through the crevasse in the Mississippi side levee and the Arkansas River levee would overtop and crevasse the fuse plug levee. For the past 5 or 6 years any flood approximately 30% less than the 1927 flood would have overtopped and crevassed the fuse plug levee.

Under the conditions contemplated by the Flood Control Act of May 15, 1928, in a flood the size and type of the 1927 flood from 800,000 to 900,000 cubic second-feet of water would escape down the Boeuf Floodway in the latitude of Arkansas City. The 1928 Act contemplates a flood 25% to 30% in excess of the estimated 1927 flood, called the project flood, which would necessitate the escape of more than 1,000,000 cubic sec-



ond-feet of water through the fuse plug levee down the Boeuf Floodway.

185 The Flood Control Act of May 15, 1928, is designed to take care of a project flood of approximately 3,000,000 second feet in the vicinity of Arkansas City. Approximately 2,000,000 cubic second feet of flood water came out of the Ohio River in this 1937 flood. The largest measured flood out of the upper Mississippi River at St. Louis was 1,146,000 cubic second feet in 1892. The largest measured discharge of the Arkansas and White Rivers into the main channel of the Mississippi River was 1,152,000 cubic second feet in 1927. The sum of these three measured discharges in the past from the Ohio River, the upper Mississippi River, and the Arkansas and White Rivers, is 4,399,000 cubic second feet.

Should the present fuse plug levee breach at the point I think most probable, the water flowing over plaintiff's land would be from 17 to 20 feet deep. Before the floodway filled up, when the crevasse was first opening up, plaintiff's property is close enough to the levee line for a velocity of from 10 to 15 feet per second, being 6 to 10 miles per hour. Such velocities are destructive. This would mean something like a volume of 130,000 cubic second feet of water flowing over plaintiff's property. Most all movable property would be destroyed and lost. Ground value would probably be lost through scouring and filling. Scouring means removing the top soil and washing it away. "Filling" means loss of value to the soil by the filling up of the floodway with sand deposited over the land to such a depth it would no longer be suitable for cultivation. The plaintiff's property being much closer to the floodway entrance than it was to the points of the levee which crevassed on the Arkansas River in 1927, future damage to plaintiff's property from any future flood using the floodway would be much more than in 1927. Under the present law and the conditions resulting therefrom, it is

certain that the fuse plug levee will crevasse in the  
186 event of a flood of the size and type of 1927, and larger. There is no chance of the fuse plug levee holding with the levee lines all around it three feet higher and built to carry three feet more of water than this fuse plug levee. The functioning of the fuse plug levee as contemplated by the Flood Control Act of May 15, 1928, is certain.

The construction of the guide levees in the Boeuf Floodway is in no way essential to the functioning of the fuse plug levee. They limit the amount of land that may be subject to floodway flow. They do not limit the entrance. So far as damage to

the plaintiff's property is concerned the constructing of these guide levees would have very little effect one way or the other.

I am familiar with the Markham Plan contemplated by the Flood Control Act of June 15, 1936. Plaintiff's property is in the floodway regardless of which plan may be ultimately executed.

As a result of the engineering facts to which I have testified, under the conditions which have resulted solely from the execution of the Flood Control Act of May 15, 1928, I do not think anyone in the exercise of good judgment could build any improvements of any consequence in this floodway, because of the continued hazard of overflow. The protection realized in the past is no longer assured. The property in this particular restricted area is assured of having to take overflow whenever there are major floods.

Plaintiff's property has never been overflowed before by waters diverted from the main channel of the Mississippi River at the point where the fuse plug levee will now breach. The bank full stage of the River at Arkansas City is 44 feet on the Arkansas City gage of the Mississippi River Commission—42 feet on the gage used by the Weather Bureau.

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#### Cross-Examination.

In 1927 the Sponenbarger property was overflowed somewhat less than 15 feet from crevasses in the Arkansas River levee above Red Fork. That levee has been restored and raised on the Arkansas River. The flood hazard has been transferred by carrying out the Jadwin Plan from the vicinity of the levee lines on the Arkansas River to the lower levee lines in the vicinity of Arkansas City, closer to the property. The 1927 crevasses were 35 miles from plaintiff's property.

Plaintiff's property was flooded in 1912, 1913 and 1916, when water from the Mississippi River came through Cypress Gap, and in the early years at the start of the levee system, it was subject to previous overflows above Arkansas City on the old levee line before the Cypress Creek Levee gap was built.

In advance of the 1937 flood the United States did some temporary work on the fuse plug levee by raising it to the 1914 grade at points where the crown was below the 1914 grade. Not very much was done.

The lowest point in the fuse plug levee in 1935, was approximately 3 miles from Arkansas City and the Sponenbarger property, just North of the new set-back levee built also to the 1914 grade, like the original fuse plug levee. (Rec. 185-186).

Since the passage of the Flood Control Act of May 15, 1928, the fuse plug levee has never failed or gone out. It is effective to its height.

In the 1937 flood approximately 2,100,000 cubic second feet passed Arkansas City at a gage of 53.8. In 1929 1,800,000 cubic second feet passed at a gage of 58.5. The difference in the type of floods causes the difference in the gage. The same reading on the gage during different floods, and during different floods the same year, does not necessarily indicate that the same flow of water is passing through the river. The 1929 flood and the 1937 flood were wholly different as to rate of rise, and other conditions. Conditions were different at the mouth of the White and Arkansas Rivers.

The Government has not taken any dirt off this fuse plug levee, or lowered it, or reduced it from its former grade. It is virtually the same as it was in 1927.

#### Redirect Examination.

The set-back levee recently constructed just North of Arkansas City was constructed to the 1914 grade and section. These grades and sections were established by the Mississippi River Commission. The grade is the controlling elevation. The 1914 grade generally means in the vicinity of Arkansas City that you have a line governing the elevation of the top of the levees which is equal to a gage reading of 60.5 on the Arkansas City gage, and generally parallel to the slope of the high water planes of the River. Similarly, the 1928 grade is a grade established on the gage at Arkansas City of 63.5, and having a slope which generally parallels the previously experienced flood elevations along the levee lines. The section adopted and established by the Mississippi River Commission following the adoption of the 1914 section is different from that of the section used under the adopted 1928 section. While the 1914 grade had a banquetted rear slope section, the 1928 grade is one continuous back slope section. Grade refers to elevation, and section refers to width of the levees. The Mississippi River Commission is an agency of the War Department of the United States Government.

Any flood coming out of the White and Arkansas Rivers joining with that of the upper Mississippi River that can safely pass through the constricted channel of the Mississippi River known as the bottle neck near Arkansas City, can be safely carried through the widened channel South of the bottle neck and past the fuse plug levee. The fuse plug levee would crevasse, if at all, in the upper portion of the fuse plug levee before reaching the bottle neck.

The levee grades from Helena to Arkansas City down to Vicksburg are predicated upon the fact that the fuse plug will break in the vicinity of the mouth of the Arkansas River, and the levee grades as established are based on the fact that with such relief there can be only approximately from 3 to 3½ feet lower from Arkansas City South, while the raise at Helena is approximately 8 feet, and the difference in levee grades at Helena is approximately 8 feet. The failure of the fuse plug levee to function would endanger the levees to the North. The most efficient point for the diversion and for the preservation of the levee grade lines North is in the vicinity of the mouth of the Arkansas River, at or about the old Cypress Creek gap. The greatest relief in the diversion occurs when the levee opens up on the upper end of the floodway nearest to the points of critical stages which you wish to relieve. The breach of the levee in the general vicinity of Lucca Landing is closest to the head of the fuse plug section, and would serve the purpose most efficaciously.

The restoration of the 1927 crevasses in the levees on the South bank of the Arkansas River from Pine Bluff down to the fuse plug began immediately after the 1927 flood. The work of restoration was in actual progress before the 1928 Flood Control Act was passed.

The volume of water which would now flow over the Sponenbarger property in a flood like that of 1927, than did actually flow over it in 1927, because of the construction work done under the Flood Control Act of May 15, 1928, would be increased in its minimum quantity by the amount of water which went over the Mounds Landing (Mississippi) crevasse, and into the Yazoo Basin (Mississippi) East of the River, which must now be taken through the fuse plug levee on the West—500,000 cubic second feet. And actually there is an accumulation of all the crevasse water above Helena which occurred in 1927 which was transferred to the mouth of the Arkansas and White Rivers, which must now be relieved by the operation of the fuse plug section if those levee lines are not to be in danger. Now the water would be deeper on plaintiff's property. com-



ing from a closer breach in the levee system, and have a higher velocity than the water which came in 1927. Under present conditions the water would be from 20 to 25 feet deep on plaintiff's property.

Floods are of different type. Generally, no two floods are alike, nor have the same characteristics so far as levee protection is concerned. There are short, quick floods and long, slow floods; and between the two there is any possible number of combinations which have occurred. In 1927 the storage back-water basins were full of water. All the tributaries were in flood. In the 1937 flood these storage back-water basins were comparatively empty. The single flood wave originated almost entirely in the lower Ohio River, passing through and down the Mississippi River into comparatively low water conditions, with only minor contributions of the tributaries at the time of the passage of the high crest. The 1937 Ohio River flood is referred to as a "flash flood". Very little water was coming out of the upper Mississippi. The Arkansas and White Rivers were at relatively low stages when the crest from the Ohio River flood reached their mouths. Had the large storage basin at the mouths of the Arkansas and White Rivers been full in 1937 when the crest of the Ohio flood reached that latitude, as they were in 191

1927, the fuse plug levee would have been overtopped. Even if half as much water had come out of the Arkansas and White Rivers in 1937 to join the crest of the Ohio flood, as did come out of those Rivers in 1927, the fuse plug levee would have been overtopped.

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S. L. Woxson, on behalf of plaintiff, testified:

I live in St. Louis, Missouri; am Assistant Chief Engineer of the Engineering staff of the Missouri Pacific Railroad Company. I have been a practicing civil engineer for 36 years. I took an engineering degree at the University and at the Massachusetts Institute of Technology. Since 1932 I have been in charge of all the engineering work of the Railroad Company. Our railroad lines extend from St. Louis to New Orleans in the alluvial valley of the Mississippi River, and it has been necessary for us to study the Flood Control Act of May 15, 1928, and to keep generally in touch with the regimen of the River and plans for its control. I am familiar with the engineering plans presented by House Document No. 90 authorized to be prosecuted by the 1928 Act, and have a general knowledge of the engineering construction work which has been done by the United States under authority of that Act.

In August, 1934, when the present suit was filed, the project was probably 80% complete. It is now substantially complete except for guide levees in certain floodways and front line levees designed as so-called fuse plug. (Rec. 229-230).

The Flood Control Act of May 15, 1928, for the first time in Mississippi River flood control plans, introduces a diversion of water from the main channel of the River as a feature of flood control. Plaintiff's property, SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 31, Township 12, South, Range 1, West, just West of 192 Arkansas City in Desha County, Arkansas, is in one of the floodways that has been created by this plan as a channel for that diversion. The United States began actual construction of this comprehensive project authorized by the 1928 Flood Control Act, commonly known as the Jadwin Plan, in January, 1929, and the work has continued right along until in 1934 it had reached the stage of approximately 80% complete.

I am familiar with the physical conditions at the head of the Boeuf Floodway, and the purpose of the fuse plug levee as designed and contemplated by the Flood Control Act of May 15, 1928. The Federal agencies determined that levees alone were inadequate to provide flood control. A general raising of the levee grade more than 3 $\frac{1}{2}$  feet was deemed impractical, and such levees were not high enough to carry such a flood as that of 1927. It therefore became necessary to provide some other means of taking care of the water that could be expected in future floods, and the means determined on was to provide several lateral floodways, one of which, in the middle section of the River, was the Boeuf valley whereby sufficient water would be diverted from the main channel of the River to prevent the breaking of the levees below. This floodway, and the functioning of the so-called fuse plug at the head of the floodway, is to crevasse and open at the predetermined elevation of the flood and permit water to escape, thereby holding the flood discharge below the fuse plug to an elevation which can be safely carried by the levees.

At the time this suit was filed in 1934, and at present, the fuse plug levee is from 3 to 3 $\frac{1}{2}$  feet lower, and of less massive section, than the West line levees above it and below it, and than the levees on the East side of the River in Mississippi. I made a general examination of the fuse plug levee in the fall of 1935, accompanied by my associates, and 193 we came to the unanimous conclusion that the location on the fuse plug that would very probably crevasse first as contemplated by the Flood Control Act of May 15, 1928, if a flood occurred, was at a place called Chicora, about

6 miles above Arkansas City. We found a combination there of a caving bank and a concrete revetment being destroyed, leaving the levee subject to destruction by flood. The fuse plug levee at that location was below the 1914 grade. I urged that that situation be taken care of and later the United States constructed a new levee behind the old levee, further back from the River, commonly called a set-back levee which, under the law, was also at the 1914 grade and section, the same as the rest of the fuse plug levee.

After the building of that set-back portion of the fuse plug levee, the point of the present fuse plug levee where a crevasse will probably first occur during a flood is near the upper end of the new set-back levee, near Lucca Landing.

This inferior section of the levee where water would pass over it because of its pronounced difference in elevation to the other front line levees raised to the 1928 grade, has been in a condition to function as a fuse plug levee as designed by the Flood Control Act of May 15, 1928, since 1931 or 1932.

I am familiar with the plaintiff's land involved in this suit. It is in the Boeuf Floodway about 6 miles below where the fuse plug levee will most likely first crevasse.

The levees along the South bank of the Arkansas River have been raised and strengthened to the new 1928 grade, whereas the fuse plug levee has been left at the inferior 1914 grade, thereby making it substantially certain in all human probability that the fuse plug levee will fail before 1940 - the levee on the South bank of the Arkansas River will fail. This has been true since 1932. Plaintiff's property, since 1932, is reasonably protected against any future flood water escaping from the South bank of the Arkansas River.

The construction work done by the United States pursuant to the provisions of the Flood Control Act of May 15, 1928, has created a different degree of flood hazard or menace to plaintiff's property in that previously her property had more or less of an even break with all the other property in the alluvial valley. Crevasses along the river might be at various places. Under the present plan and law, the location of the levee failure in the middle section of the river has been pre-determined at the fuse plug whenever the floods are sufficient to cause the fuse plug to operate. Plaintiff's property has been subjected to a greater magnitude of overflow by the increase of height of levees to the 1928 grade, increasing the height of major floods and the depth of the overflow which passes out through the fuse plug when the fuse plug operates.

An essential feature of the adopted plan is that the fuse plug levee shall be overtopped, and shall remain open, when the river reaches the stage of 60.5 feet on the Arkansas City gage. In all human probability that fuse plug levee will function as is contemplated by the Flood Control Act of May 15, 1928. This has been true ever since the front line levees on the East side of the river, and the levees on the West side of the river North and South of the fuse plug have been raised to the new 1928 grade and section—since about the year 1932, I believe.

When the flood stage of 60.5 feet on the fuse plug levee is reached, and the river continues to rise, the water will flow over the fuse plug and will gradually wash away or 195 crevasse the fuse plug levee so as to hold the flood stage in the river itself at about 62.5 feet on the Arkansas City gage. This is an essential feature of the plan. This will cause a flow in the floodway to pass over plaintiff's property, building up sufficient velocity and depth to practically destroy all improvements upon it, fill up the ditches, float away all buildings, destroy the fences, wash away the top soil or deposit sand and material upon it, practically cutting off the productiveness of the property.

The fuse plug levee will probably fail at its upper end near Lucca Landing because it will naturally be overtopped where the flood first hits it coming down the river from the mouth of the Arkansas at the upper end of the fuse plug. Such is the definite, asserted intention of the plan. The fuse plug levee may fail from other causes than overtopping, such as inadequate foundation, producing seepage, where the levee crosses old water courses that formerly discharged into the river. Above Arkansas City there are two points of possible weakness of that kind, one called Mills Bayou and another at Possum Fork, near Lucca Landing. At Possum Fork the main current of the river is right against the levee and it is a notoriously bad levee foundation in that vicinity. I would look for a failure to be right at or near that point.

When levees overtop and crevasse they usually wash away to their natural depth, and right at the crevasse the natural ground washes away to a considerable extent, forming a "blue hole". The water in the river outside the levee is considerably higher than the land behind the levee, and when the levee fails the water goes through from the river in a torrent head and scours out the ground behind the levee in what is called a "blue hole". The blue hole at Luna Dyke is 80 feet deep.



196 No part of this fuse plug levee failed, or was overtopped, during the 1927 flood. When the flood water was near the top of the fuse plug levee at Arkansas City, it was relieved by crevasses on the East side of the Mississippi River at Mounds Landing, and crevasses on the South bank of the Arkansas River at Pendleton and Medford. In all human probability there will be no more crevasses on the South bank of the Arkansas River because it is specifically a part of the plan of the Flood Control Act of May 15, 1928, and of the construction work done under that plan, that such crevasses shall not again happen. The Act is designed to prevent these reliefs to the fuse plug levee.

It is generally considered that a flood of the 1927 type, but of less total discharge, would put the fuse plug in operation. Roughly that can be measured by the amount of relief that occurred when the fuse plug was about to be overtopped in 1927 by discharging through the crevasses in that vicinity representing a volume of the 1927 flood something between one-third and one-fourth. Since the creation of the fuse plug by work on the other front line levees as contemplated by the Flood Control Act of May 15, 1928, which would be since approximately 1932, a flood approximately one-third to one-fourth less than the volume of the 1927 flood of that type would cause the fuse plug levee to breach and the floodway to function as planned by the law. A flood of the size and type of the 1927 flood would discharge at least 600,000 cubic feet per second down the Boeuf Floodway as contemplated by the Flood Control Act of May 15, 1928. The project flood contemplated by the Flood Control Act of May 15, 1928, would flow approximately 1,000,000 cubic feet per second in the Boeuf Floodway.

In the event of a breach of the fuse plug levee at the point where it will most probably occur, under the conditions contemplated by the Flood Control Act of May 15, 1928, 197 the flood waters will reach a depth on plaintiff's property in a flood like that of 1927 greatly exceeding the depth to which plaintiff's property was actually flooded in 1927. Much more water will now come down the Boeuf Floodway.

The guide levees on either side of the Boeuf Floodway as prescribed by the Flood Control Act of May 15, 1928, have not been constructed. Their construction would have no substantial effect upon the plaintiff's property. The guide levees are not necessary to the operation of the fuse plug levee as contemplated by the 1928 Act. The fuse plug levee

is now serving the purpose for which it was designed under that Act. This has been true for 5 or 6 years.

If the fuse plug levee were built up to the 1928 grade and section like the levees North and South of the fuse plug, and like the levee on the East bank of the river in Mississippi opposite the fuse plug, we would have restored the condition that existed prior to the plan of the 1928 Act when the entire valley had an even break. In any flood equal to that of 1927, or greater, the levees would breach at some point between Cairo and the Red River.

The plaintiff's property has never been overflowed by a planned diversion from the main channel of the Mississippi River. There never was a planned diversion prior to the Flood Control Act of May 15, 1928, and since that time the plaintiff's property has not been overflowed.

"The project flood" contemplated by the Flood Control Act of May 15, 1928, is not the greatest possible maximum flood that can come down the river; and does not purport to be.

The Boeuf Floodway was not the only possible method for taking care of excess water from the Mississippi River. The plan itself reviews a number of alternate possibilities, and selects this.

198 There is a difference between a natural outlet from the river and an artificial diversion. A natural outlet is one that exists in a state of nature, as may be found by a creek entering the river which at times of flood receives the flood flow of the river; whereas a planned diversion is an arrangement artificially set up to insure that at predetermined stages water will pass through the protecting work, such as in this case the levee line.

In the report of the Chief of Engineers for 1919, No. 3, page 3715, and in the annual report of the Chief of Engineers for 1920, Part 2, page 2999, after various studies had been made of the gap in the levee at Cypress Creek which formerly was a natural outlet and allowed the water to escape from the Mississippi River down the Tensas Basin, property owners were given the assurance that the closure of that gap would give absolute flood protection in succeeding years. In the report of the Chief of Engineers for the year 1926, after the levee had been built across the mouth of Cypress Creek closing the gap, the statement is made that the flood control works were then in a condition to prevent destructive damage by floods.

The magnitude and frequency of future floods are not predictable in America. It requires an interval of scientific observation of the regimen and behavior of a river anywhere from 500 to 1000 years before we can predict the magnitude and frequency of major floods. We do not have in any part of America sufficient background and bases for these observations. We have less than 100 years; in fact, less than 50 years of any reliable records and observations. Any statement that the Boeuf Floodway will be used on an average of once in ten years, or once in fifteen years, or once in any other period of years, is essentially speculative. No such statement can be made with safety or confidence.

199

## Cross-Examination.

The levees on the South bank of the Arkansas River were raised to the 1928 grade and section five or six years ago, and recently this has been extended to the railroad crossing at Yancopin. The territory North of the Arkansas River is a vast storage territory for back water. The front line levees on the East bank of the Mississippi River have been raised and strengthened since 1928 to the 1928 levee grade and section to prevent flood waters from escaping from the main channel of the Mississippi River. The Government has created a floodway in Missouri, primarily to lower the maximum crest at Cairo and prevent the Cairo levees from being overtopped. A floodway has been created in the Atchafalaya Basin to hold the stage of water in the main channel above Red River to the capacity of those levees. Bonnet Carre Spillway has been introduced directly above New Orleans as an additional safeguard to take out of the main channel about 250,000 second feet and send it into Lake Pontchartrain. The plan provides for a certain amount of channel improvement in the way of dredging and revetment which has been carried on. These are the main features of the work done by the United States since 1928. The entire levee line, except the fuse plug levee, has been raised  $3\frac{1}{2}$  feet.

In the few years of which we have the record, there is no record of such a flood as the "project flood" contemplated by the Flood Control Act of May 15, 1928.

The fuse plug levee protecting the plaintiff's property has not been physically changed or altered by the Government adopting the Jadwin Plan; relatively its protection has been reduced. The Sponenbarger property does not have the same relative protection from the fuse plug levee that it had prior to May 15, 1928, notwithstanding the levee is at the same physical height and the Government has not yet caused

200 any water to pass over this levee. The property does have higher levee protection on the South bank of the Arkansas River.

### Redirect Examination.

The reason plaintiff's property has relatively less protection from the fuse plug levee since the passage of the Flood Control Act of May 15, 1928, is that other front line levees have been raised. If all front-line levees were raised throughout there would be a uniform measure of protection; but where the front line levees are raised and strengthened except for a certain section which is left at an inferior grade, left in a more vulnerable state, the property behind the inferior levee has relatively less protection than it had before. This creates a condition which is the same as if the entire levee line had been left alone except to cut down a part of the existing levee.

P. T. SIMONS, on behalf of plaintiff, testified:

I live in St. Louis, Missouri. For eleven years have been Assistant Engineer in the Engineering Department of the Missouri Pacific Railroad Company, the principal portion of my work being on drainage and flood control problems affecting the lines of that Railroad. I have practiced my profession for thirty-three years since graduating at Purdue University. I have studied hydraulic flood control and drainage, and in 1924 prepared a thesis on Flood Control and Drainage in the basin of the Red River, for which I received a degree from Purdue University. I worked for the United States Department of Agriculture in twenty states as senior drainage engineer, my last year of such service being in Desha County, Arkansas, investigating the drainage and flood control problem of the Cypress Creek Drainage District in Desha and Chicot Counties, Arkansas. I have been familiar with the Sponenbarger forty acres of land for more than ten years.

201 I am familiar with the map of the Cypress Creek Drainage District, referred to as "Figure 3" in Act 80 of the General Assembly of the State of Arkansas, approved February 25, 1915, creating the Cypress Creek Drainage District. I was in Desha County, employed by the U. S. Department of Agriculture, measuring and investigating drainage, surface run-off, and flood control problems of the land in Cypress Creek Drainage District covered by this Figure 3 of U. S. Department of Agriculture Bulletin 198, Exhibit No. 26.



This plan of drainage was developed in order to divert the flow of Cypress Creek southward into natural drainage channels in order to permit the levee system along the South bank of the Arkansas River to be extended and connected with the levee system starting at the mouth of Cypress Creek and extending down stream along the Mississippi River to and below the Arkansas-Louisiana line. I am familiar with the history which [lead] to the closing of the opening of this Cypress Creek into the Mississippi River leaving a gap in the levee there. In the early eighties levees had been extended from Pine Bluff along the South bank of the Arkansas River to a gap of about 14 miles at the mouth of Cypress Creek before the levee began along the Mississippi River which extended down stream to the mouth of Red River in Louisiana. Various reports were made on this gap by the Mississippi River Commission and by the Corps of Engineers of the United States Army. The property owners whose land was subject to overflow by water which escaped from the Mississippi River through this gap in the levees at the mouth of Cypress Creek finally established the Cypress Creek Drainage District by a special Act of the Arkansas Legislature for the purpose of closing this gap in the levees at Cypress Creek. In order to do this, they were required by the Federal Government to divert the waters of Cypress

202 Creek downstream on the landward side of the Mississippi levee before the Federal Government would permit the Cypress Creek gap to be closed. Contracts were let extending the levee on the South bank of the Arkansas River downstream, thus narrowing the gap at Cypress Creek and limiting the amount of water that would flow out of the Mississippi River through the gap. These contracts were under the general supervision of the Mississippi River Commission and the Corps of Engineers of the United States Army.

The work of drainage by the Cypress Creek Drainage District progressed sufficiently for the Mississippi River Commission to permit the actual complete closing of the Cypress Creek Gap, so as to make the levee line without a break in what has now become the fuse plug levee, in 1921. Since that time there has never been an overtopping or crevassing of that portion of the levee at the head of the Boeuf Floodway.

I am familiar with the engineering plan set forth in House Document No. 90 which was adopted by the Flood Control Act of May 15, 1928. I have kept in close touch with the building of the levees along the Mississippi River and the South bank of the Arkansas River, making frequent visits to

the Mississippi River Commission office and the United States District Engineers' Office in Vicksburg, and making personal inspections in the field in order to keep informed as to the status of the work on the adopted plan. Approximately 80% of the plan authorized by the Flood Control Act of May 15, 1928, had been completed at the time the present suit was filed in August, 1934. The 20% incomplete represented the building of the guide levees on each side of the Boeuf Floodway and the Atchafalaya Basin. These guide levees have not yet been built in the Boeuf Floodway. 90% of the original project has now been completed.

203 When the present suit was filed in 1934, the project had been sufficiently completed for approximately five years for the fuse plug levee at the head of the Boeuf Floodway to function as was designed by the Flood Control Act of May 15, 1928. That stretch of the levee has actually served as a fuse plug levee, as designed by the Act, since 1932.

The work done by the United States under the Flood Control Act of May 15, 1928, especially as it has been effective since approximately 1932, has established the Boeuf Floodway in operating condition, and plaintiff's property being within the Floodway has been in jeopardy of overflow when the floodway goes into operation.

Before the Flood Control Act of May 15, 1928, plaintiff's property was provided with the same degree of levee protection against overflow as other property in the State of Arkansas and the State of Mississippi. The 1928 flood control plan placed this property in the Boeuf Floodway. The United States Government began work on the actual construction of this project, authorized by the 1928 Act, approximately January 10, 1929.

Treating the plan as a whole, the fuse plug levee is designed and contemplated by the Flood Control Act of May 15, 1928, as an inlet for diverting water from the Mississippi River into the Boeuf Floodway when the stage of the river reaches a gage height of 60.5 feet at Arkansas City. The purpose of this diversion is to prevent floods from overtopping the levees on both sides of the Mississippi River above and below this diversion and on the South bank of the Arkansas River. By using that portion of the area in the Boeuf Floodway for the purposes stated, the other five-sixths of the entire alluvial valley of the Mississippi River is protected against flood. One-sixth is used for a floodway.

204 I was a member of the surveying party that made the survey of plaintiff's forty acres of land in 1935 shown by Exhibit 25, and am personally familiar with the elevation of each part of the forty acre tract as reflected by this map. I was a member of the surveying party that made the profile of the fuse plug levee referred to by Mr. Neptune, and am personally familiar with the actual elevations and conditions of the fuse plug levee as it affects this property.

For about three years prior to 1935, a crevasse in the fuse plug levee would most probably have occurred at some point near Chicora Landing, about 5 miles upstream from Arkansas City. The top of the levee there was at a low elevation with reference to the 1914 grade line, and there was a caving bank on the river a short distance from the toe of the levee. Now, in the event of a flood requiring the use of the floodway, the fuse plug levee would most likely crevasse just above Lucca Landing in the vicinity of Possum Fork. In moving down stream the crest of the flood will reach that point early, and this being the upper part of the fuse plug levee and the lowest point in the fuse plug section with reference to the 1914 grade, the flood would overtop the levee at that point earlier than it would overtop it at any other point. As shown on the map, this weak point at Lucca Landing is located downstream from the mouth of the Arkansas and White Rivers where the levees are wide apart. The water levels in that area will rise to a sufficient elevation to force the water through the gorge (bottle neck) between Catfish Point and Chicora Landing before the same elevation will be reached on the fuse plug levee below Arkansas City.

205 The operation of Boeuf Floodway as a diversion channel as designed by the Flood Control Act of May 15, 1928, will lower the gage heights along the river on both sides above the spillway, or outlet from the river. To be most effective for the relief of the levees South from Helena to the mouth of the Arkansas River the fuse plug levee should be blown above Arkansas City in the event of a flood. This would put more water on plaintiff's land than any flood has ever done prior to the adoption of this plan. The crevassing of the fuse plug levee would be so close to the plaintiff's land that it would receive the maximum effect of the diversion from the river.

When the fuse plug levee fails in the vicinity of Lucca Landing, where it is most probable to crevasse, as now authorized by the Flood Control plan of May 15, 1928, a flood of the type and volume of the 1927 flood would flow approxi-

mately 25 feet deep over the plaintiff's land. This is approximately 10 feet deeper than plaintiff's land was actually overflowed in 1927. The extra water which would now flow over plaintiff's land escaped into the State of Mississippi in 1927 through the Mounds Landing crevasse in that latitude. Also such water as did flow over plaintiff's land in 1927 escaped from the Arkansas River through the Pendleton and Medford crevasses. Now in the floodway the crevasse in the Mississippi River levee would be in closer proximity to plaintiff's land and more destructive.

The levees on the South bank of the Arkansas River as authorized and contemplated by the Flood Control Act of May 15, 1928, have been substantially completed for approximately five years. For the last five years and hereafter plaintiff's property is reasonably protected against any future floods from waters escaping from the South bank of the Arkansas River.

206 The effect of construction work done under the Flood Control Act of May 15, 1928, has subjected plaintiff's property to a different and increased flood hazard; to more depth of water and a greater velocity of flow on account of the close proximity of this property to the fuse plug levee. The volume of water increases rapidly with depth of flow and velocity. The increased velocity is very destructive to the property. This velocity over plaintiff's land in a flood the type and size of that of 1927 would now probably be 8 to 12 feet per second.

Under the present plan and conditions destructive flood waters will now pass over plaintiff's property by reason of diversion from the main channel of the Mississippi River at a gage of 60½ feet on the Arkansas City gage. It might occur at a less gage height, approximately 59 feet, because of winds, the current, swamps, and rain fall in the immediate vicinity. Wave wash is destructive to the life of levees of this type. Waves from the Northeast might run as high as 4 feet against the fuse plug levee at Chicora Landing.

"Free board" is the vertical height from the surface of the water to the top of the levee, and is to prevent the overtopping of the levee, affording relief against wave wash. The free board established in the adopted project by the Flood Control Act of May 15, 1928, is one foot. Five feet of free board should be provided. At a stage of the river of 60.5 on the fuse plug levee at Arkansas City it would have no free board.



The fuse plug levee cannot safely be overtopped at any depth whatever without a crevasse being reasonably certain. When a crevasse does occur the full height of the levee will probably wash away down to the ground surface, and considerably below the ground surface.

A flood 25% less than that of 1927 would now overtop and breach this fuse plug levee. This has been true for about three years.

207 The guide levees in Boeuf Floodway called for in the Flood Control plan of May 15, 1928, have not been constructed. They are in no way essential to the functioning of the plan so as to protect all of the alluvial valley of the Mississippi River except that portion actually in the floodway, as designed. The fuse plug levee is now in a condition to function whenever any flood occurs that reaches the point where the fuse plug levee is intended to function, viz., a gage of 60.5 on the Arkansas City gage. This has been true for approximately five years.

If the fuse plug levee were built to the 1928 grade and section, so as to make it equal in grade and section with the levee in the State of Mississippi opposite the fuse plug, and with the levees North and South of the fuse plug, it would place the entire valley in the middle section subject to levee failures at different points wherever the weakest levee should develop; which would entirely eliminate the diversion feature of the plan, and would destroy the plan.

Plaintiff's property is within the limits of the Boeuf Floodway, about 6 miles in a downstream direction from the point where the fuse plug levee will probably first fail. The map shows cleared land between this point of probable failure and plaintiff's property which will permit higher velocity to reach plaintiff's land than if the area intervening was heavily timbered. The building of the guide levees would in no way relieve the plaintiff's property from the flood menace under which it now rests.

Plaintiff's property has never before been overflowed by waters diverted from the main channel of the Mississippi River.

During former floods I have been present when the local people were making flood fights along this fuse plug levee. The Missouri Pacific Railroad has about 90 miles of main track in this immediate vicinity. During former floods  
208 the local property owners have exercised their rights to defend their property against floods from the Mis-

Mississippi River by building up the top of this levee with sacks of earth, bulwarks and such things. But for the Flood Control Act of May 15, 1928, holding this fuse plug levee at the 1914 grade, it would be possible in an emergency to so raise this fuse plug levee as much as 5 feet—2 feet higher than the levees now existing on the opposite bank of the Mississippi River.

The Medford and Pendleton crevasses on the Arkansas River in 1927 were about 4 miles apart, and 27 miles from the nearest crevasse to the plaintiff's land.

#### Cross-Examination.

Plaintiff's land was overflowed in 1912, 1913, 1916, and 1927. It would have been overflowed in 1929 if the Pendleton and Medford crevasse had not been repaired.

The Government has not committed any physical act to change the height or grade or strength of the fuse plug levee.

#### Re-Direct Examination.

The fuse plug levee has been subjected to additional stress, strain and loading with responsibility under the Flood Control Act of May 15, 1928. The relative strength of the fuse plug levee in comparison with the strength of the levees above and below the fuse plug, and on the opposite side of the river from the fuse plug, has been decreased to cause the levee to crevasse when the river reaches a stage of 60.5 feet on the Arkansas City gage.

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E. G. SPONENBARGER, on behalf of plaintiff, testified:

I am the husband of the plaintiff, Mrs. Julia C. Spokenbarger, and am her agent in the management of her property. The plaintiff owns the 40 acres of land involved in this law suit, described as SW $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 31, Township 12, South, Range 1, West. I have purchased the land for her, and now file for the record certified copies of her chain of title from the United States Government, which chain of title originates August 3, 1858, and ends with the Warranty Deed from George Hight and wife to Julia C. Spokenbarger, dated January 20, 1927, properly recorded in Desha County, Arkansas, conveying the land in question, reciting a cash consideration of \$3,500.00. The land is practically all in cultivation.

The plaintiff, and those under whom she holds title, have had the actual, open, continuous, notorious, peaceful, adverse

The plaintiff paid in cash for this land on January 10, 1927, \$100.00 per acre, which at that time represented a fair market value of the land. I have lived in Desha County for thirty years and am generally familiar with the development of Desha County and the marketing of lands around Arkansas City. I have bought various tracts of land, and am generally familiar with other sales in this area.

After the passage of the Flood Control Act of May 15, 1928, when it became generally known in the community that this 40 acres of land lay in the Boeuf Floodway, it lost its value on the market. After reasonable effort and diligence during the year 1929, I would say the fair market value of this land for which it could have been sold was \$10.00 or \$15.00 per acre. That represents the fair market value of similar lands in that locality, similarly located in this floodway. Measured by this difference of market value before and after the placing of this land in the Boeuf Floodway by the Flood Control Act of May 15, 1928, the damage sustained by this  
 210 property was about 80% loss. With the improvements I had put on it this would be \$100.00 per acre.

There was no change in the fair market value of this land up until the time this suit was filed in August, 1934. Plaintiff has neither been offered nor paid any compensation by the Government, or anyone else, for the taking of this land for floodway purposes, nor for flowage rights thereover. The plaintiff has never been made a defendant in any condemnation suit by the Government to acquire flowage rights over this land. The plaintiff is a native citizen of the United States; has made no assignment or transfer of her claim for damages against the United States involved in this action; has at all times borne true faith and allegiance to the Government of the United States; has never in any way voluntarily aided or abetted or given encouragement or support to rebellion against the Government of the United States; and no Congressman is, or can be, in any way [benefitted] by plaintiff recovering in this action.

The reason why placing this property in the Boeuf Floodway by the Flood Control Act of May 15, 1928, has depreciated its market value is because the land is reserved to be used when the river passes a certain stage; the Act deprives the plaintiff of any right to protect her land and raise the levee; it takes her rights away from her; it destroys the market which she had at Arkansas City which before was a good town; it has ruined the school due to the fact of so many people leaving on account of the town being subject to this overflow; and there are so many reasons.

Plaintiff's property is fertile, like other land in that community, and will produce 350 to 500 pounds of lint cotton per acre. The land lies adjacent to a concrete inter-state highway, leading to Little Rock, the capitol city of the State, toward the North, and connecting with highways and a ferry leading into Louisiana and Mississippi. It was an inter-state road. Since the creation of Boeuf Floodway there is no ferry at Arkansas City.

The property is well drained both naturally and artificially. We bought the land for the purpose of building a home on it. I had the plans and specifications made. When we learned that the property was in a floodway created by the 1928 Act, that destroyed all our desire for a home out there.

Mrs. Sponenbarger and I were engaged in the drug business in Arkansas City at the time, only two miles from this land on the concrete highway, and near enough for us to have lived on the land and continued business in town. Since the creation of this floodway, so many people have left Arkansas City that it no longer constitutes a market for the products of this farm.

Taking into consideration the actual condition of this land, its fertility, its productiveness, its location, its drainage, its improvements, and all other features that actually existed, at the time this suit was filed the land would have had a fair market value of \$125.00 if it had not been in this floodway.

No past due taxes or assessments of any kind are due to the State of Arkansas, the Southeast Arkansas Levee District, the Cypress Creek Drainage District, or any other taxing authority.

The placing of this property in the Boeuf Floodway as the result of the passage of the Act of May 15, 1928, destroyed its loan value. Both the Federal Land Bank of St. Louis and the Federal Housing Administration declined my application for loans on property in this floodway.

#### Cross-Examination.

I have lived in Arkansas City since 1908. Besides operating a drug store, I am also a public ginner and farm. I own my own home in Arkansas City which I have substantially improved during the past winter.

The same flood situation exists in Arkansas City as exists at plaintiff's land until the authorized ring levee around Arkansas City is completed. Witness bought four adjoining lots to his property in Arkansas City recently, in 1937, to make



the yard larger for flowers. Spent a good deal of money the past winter in enlarging his house. He recently bought one hundred twenty acres of land just across the highway from the land in controversy. This was wild land and he had cleared it and put in cultivation, and built some houses on it. He had contracted for more land but had not closed the deal.

In 1933 I bought 120 acres of cutover timber land about one-half mile nearer Arkansas City than plaintiff's property for \$1 per acre. It will be protected by the ring levee around Arkansas City when it is built. The fertility and productivity of the soil is just as good as plaintiff's 40 acres. I have cleared it all up, built some houses off it, and put it in cultivation. This cutover woodland which I bought for \$1 an acre had a market value of \$10 or \$15 an acre before it was put in the floodway by the 1928 Act.

After buying her land at \$100 per acre on January 10, 1927, plaintiff put about \$25 per acre of buildings and improvements on the land. Thereafter the 1927 flood overflowed the land about 15 feet deep. That did not hurt the market value of the land. The price did not go down until the Government took possession of it for flowage rights, and said they were going to turn the water in on it when the river got to 60.5 on the gauge. We are still in possession of the land, farming it and making good crops on it. No one has interfered with our possession. The United States took the right to use it for flowage in 1928. When it became generally known that the land was in the floodway it was ruined from the standpoint of market value.

This land was overflowed in 1912, 1913, 1916 and 1917, but was worth \$100 per acre when I bought it in 1927. Only  
213 after it was put in the floodway was its market value taken away. The fertility of the soil has not been hurt.

I have borrowed money several times, and have included this land as security, but the loans were made to me on my personal statements, and my home, and my gin business, and not on any loan value of the plaintiff's property.

The price of cotton went down to 5c or 6c a pound in  
214 1930, but that had nothing to do with the low value of plaintiff's land because its value was already gone.

The land has not been flooded since 1927. We haven't had any flood fight. The Lord has been with us. The Government repaired the 1927 crevasses at Pendleton and Medford on the Arkansas River.

Neither the 1927 flood, nor any former floods decreased the market value of these lands in the vicinity of plaintiff's property. On the contrary, there had been a steady trend up of such market values in Desha County prior to the passage of the Flood Control Act of May 15, 1928. After the flood of 1916, market values were higher than they had ever been. After each flood the levee district board would fix the levee and tell us we would have protection. By 1927 the levee line from the mouth of the Arkansas River downstream was actually completed and actually protected us during the 1927 flood. The steady increase in market values notwithstanding former floods grew out of our assurance of flood protection. The Flood Control Act of 1928 put us in a floodway and destroyed this assurance which had given market values to our lands.

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E. E. Horson, on behalf of plaintiff, testified:

I have lived in Arkansas City, the county-seat of Desha County, Arkansas, since July 4, 1908, about 2 miles from plaintiff's property. I have practiced law in that county for 28 years; and have represented the banks, sawmills and land companies in the county since that time; have owned in excess of 1500 acres of farm lands, and in excess of 10,000 acres of cutover lands; and now own 3 farms in the county in the Boeuf Floodway. The banks which I have represented cover pretty closely all the business interests involved in the land which is now known as Boeuf Floodway. I have become personally familiar with market values and loan values in that area during that period of time, and by reason of my business of examining titles have been familiar with most of the land sales that have been made. I am familiar with the real estate records of the county, the assessment values, and economic development of the county.

Arkansas City had a population of about 3100 people in 1926. The population does not now exceed 1400 people.

Of the land area in Boeuf Floodway, about 20% is in actual cultivation and the remaining 80% is cutover land, which means that the timber has been cut and removed from it. All of the land is fertile and susceptible to cultivation.

When I went to Desha County as a young man there was a large gap in the Mississippi River levee line at the mouth of Cypress Creek. There were a number of well developed farming interests, mostly large farms that carried the title of plantation. A number of these large plantations were valuable and occasionally some of them sold, but ordinarily they

were owned by the same persons for years and were not on the market as often as farms of smaller size. Cutover land at that time had very small value. Beginning in 1912, the lands began to be sold and after 1913 values rose. By 1916 the Cypress Creek Drainage project was beginning and land values continued to rise very rapidly. By 1920 values were very high as compared with 8 to 10 years before. Cutover lands by that time had a ready saleable market at from \$18 to \$40 an acre; and farm lands were selling in excess of \$100 per acre. About 1922 there was a slight falling off in the market values of woodland and cutover lands, but farm lands in actual cultivation remained practically the same until after the creation of the Boeuf Floodway when there were no values.

By 1929, after the creation of the Boeuf Floodway, all loan agencies had withdrawn from making loans within the  
216 Boeuf Floodway, and no local bank would make any loan against any of the land within the vicinity of Arkansas City, and there were no land values.

When I first went to Desha County, all of the surface water south of the Arkansas River from Pine Bluff southeast emptied into the Mississippi River through Cypress Creek, leaving a gap in the levee lines along the river at that point. Before this gap in the levee could be closed it was necessary to provide other drainage for that water. Cypress Creek Drainage District was formed for this purpose in order that the gap in the levees could be closed. The gap was closed in 1921 by the Southeast Arkansas Levee District which was created for that purpose, by the Arkansas Legislature, at the request of the Mississippi River Commission made in 1916, under supervision of the United States Corps of Engineers. This levee line, which is now designated as the fuse plug levee, has never failed by being overtopped, crevassed or breached since 1921.

When the Cypress Creek Drainage District was created and the people knew that the gap in the levee at Cypress Creek was going to be closed, that is what brought about the increased market values.

The successive overflows of this territory by the Mississippi floods of 1912, 1913 and 1916 did not have any effect on the market values of land there because we were all looking forward to the closing of the levee gap, and bringing the levees up to sufficient grade to control the floodwaters of the Mississippi and Arkansas Rivers. The 1916 flood was the greatest flood we had ever had up to that time, but just two

years after that 1916 flood cutover land in that area was selling up to \$40 an acre and farm lands sold for more than \$100 an acre. These values prevailed, notwithstanding the fact we had just endured 3 major floods, on account of the fine, rich country, the productivity of the lands, and the belief  
 217 of the people that they had solved the flood problems, and were protected. After 1916, the next flood which overflowed these lands was that of 1927. The 1927 flood did not destroy nor depreciate market values any more than any of the preceding floods.

I am personally familiar with the plaintiff's 40 acres of land and its market value. Small tracts of land usually sell for more per acre than large tracts. Practically all of plaintiff's land is in cultivation. It is located on State highway within 2 miles of Arkansas City, which, at the time of plaintiff's purchase, was a thriving, progressive town with sawmills, banks, gravel companies, and logging operations. The land is very fertile and offered every inducement to a small property owner as a desirable home. The fair market value of plaintiff's 40 acres immediately prior to the passage of the Flood Control Act of May 15, 1928, was from \$100 to \$125 per acre. When it became generally known that it was in the bed of the Boeuf Floodway created by the Flood Control Act of May 15, 1928, it had no market value.

Immediately following the final order of the President on January 10, 1929, approving the Boeuf Floodway, the order was published in the State newspapers, but was given greatest publicity as to the intention of the United States when Major Lee from the District Office of the United States Corps of Engineers at Vicksburg came into the territory and at public meetings of the people explained the purpose of the Boeuf Floodway and the provisions of the Flood Control Act of May 15, 1928. Then it was that market values were destroyed.

If the plaintiff's land had equal flood protection with other protected areas of the alluvial valley of the Mississippi River not in the Boeuf Floodway it would have had a fair market value at the time this suit was filed in October,  
 218 1934, of \$100 per acre. The Flood Control Act of May 15, 1928, placed plaintiff's property in this floodway with the specific provision that the fuse plug levee should not be raised or strengthened above the 1914 grade and section and that the levees above on the Arkansas River and on the east bank of the Mississippi River should be raised and strengthened, thus making it definite and certain that these lands in the floodway would be overflowed, and



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that the crevasse would be brought into closer proximity of plaintiff's land, thereby subjecting it to greater velocity of water, more soil erosion or greater deposits of sand, thus completely destroying the desire of any person to own any such land.

The plaintiff's property right of defense has been taken away by the plans and specifications adopted by the Flood Control Act of May 15, 1928. Theretofore during a flood fight every available man in the vicinity would participate in a fight exercising the right of the property owners to defend their property by building up the levee. I have seen water carried by sacking the levee 5 feet higher than the levee crown. That was true in all levee fights, especially during the 1927 high water fight when many miles of the levee were thus actually raised so as to safely carry the water past the fuse plug levee at a gauge of 60.5 feet until the river receded and the pressure on the levee line was relieved by the crevasse at Mounds Landing on the opposite side of the river.

I know that no real estate or farm loan would be made by local banks on property in the floodway. In some cases, particularly in the case of Mr. Sponenbarger's loans, such land would be included as security but there was always other collateral to secure the loan. Farmers are borrowers of money and if their land is not good for collateral it depreciates the market value of the land.

219. No person would undertake to build a home in the path of the Boeuf Floodway. This has the effect of destroying or taking away from the market value of that land. (Rec. 440.)

Prior to the Flood Control Act of May 15, 1928, extensive plans for developing this area, by selling land to the investing public and farming people who were looking for homes, were made by the Missouri Pacific Railroad Company by extensive advertisement. That development was entirely abandoned when this property was placed in the floodway because you can not sell land in the floodway. I was personally interested in a number of other such proposed developments in that area, but all such development plans were abandoned after the 1928 Act because we thought that the market value of lands in the floodway had been completely destroyed in so far as being worthwhile as a place for people to build homes and live.

After the creation of the floodway by the 1928 Act fire insurance policies on property in the vicinity of plaintiff's

land were cancelled or reduced to a negligible amount, tending further to the destruction of market values.

By the destruction of industries at Arkansas City as the result of the Boeuf Floodway, it destroyed Arkansas City as a market place to which plaintiff's property was accessible. The lumber industries, which afforded employment to a large number of people, were completely paralyzed after it was learned that Arkansas City would not have adequate flood protection. The schools were reduced from a high standard to one of the lowest grades in the State. This has had a marked effect on market values in the vicinity of plaintiff's property.

After the creation of the Boeuf Floodway, the Arkansas-Louisiana Highway along plaintiff's property was eliminated from Federal aid, and the road has fallen into a very decayed condition, directly affecting the market value of plaintiff's property. Since the placing of this property in the floodway, all plans for draining land from an agricultural standpoint in that vicinity have been completely abandoned. There are not sufficient land values left to support bond issues.

The market value of cutover lands in the Boeuf Floodway has been destroyed because such lands can not now be sold after being put in cultivation for the actual cost of putting such lands in cultivation. This has affected the market value of plaintiff's property.

The floodway has increased the tax burden on plaintiff's property, thus affecting its market value, because such a large amount of land has been allowed to forfeit for the non-payment of taxes, and that which remains on the tax books is there at such a low value that no tax income is received from them, thus practically wrecking the county in the matter of building bridges, taking care of dirt roads, providing health nurses, county agents and home demonstration agents, which county functions are now left to the gratuitous donations of the farmers.

The general national economic depression began in 1920. No part of the loss of plaintiffs' market value can be attributed to that general depression because plaintiff's land had lost its market value prior to that time. No part of her loss of approximately \$100 an acre can be attributed to that depression. It had already been lost. At the present time, when the depression is passing and the Department of Agriculture reports a return in general agricultural values over the country as a whole to 82% of pre-war level, no part of

the market value has been restored to plaintiff's land in this floodway.

No part of the plaintiff's loss of market value can be attributed to the bonded indebtedness or taxes and assessments against her land. There has been no change in the tax burden since the plaintiff bought her land in 1927. The  
221 market value of plaintiff's land in 1927 existed notwithstanding the tax burden in which there has been no change except to lower assessments.

The market value of land in the floodway like plaintiff's has also been affected because there is not as good a class of tenants within this floodway as we had before. A great many of the enterprising tenants who own their own live stock have moved to communities where more protection is offered.

There has been some increase in the population in Desha County, mostly outside of the Boeuf Floodway, by large numbers of people who are donating from the State of Arkansas these lands which have been forfeited for nonpayment of taxes. I think this can be done at a cost not in excess of \$10 per 40 acres. A portion of such donators are on the public relief rolls, supported by various Government agencies that offer aid to destitute people. This tends to lower the level of all land values, and such an increase in population has not increased the market value of the plaintiff's property.

I am familiar with the present ownership and purchases of property immediately surrounding the plaintiff's 40 acres. I pass that property twice each day in going to and fro from my home in Arkansas City to my business office in McGehee. In 1933 or 1934 A. P. Price purchased the 160 acres of land joining the Sponenbarger 40 on the South side for \$1.00 an acre. He bought the adjoining 80 acres in the woods for \$1.00 per acre. These were not forced sales, but were free and voluntary purchases on the open market, representing similar purchases that could be made in the floodway generally in that vicinity from the fuse plug levee on down. \$1.00 per acre was the fair market value of that property in the floodway. If this property were not in the floodway it would have a fair market value of \$65.00 or \$70.00 per acre.

222 There has been no change in these market values since January 10, 1929.

Immediately East of this Price land in the Section adjoining the plaintiff's property, E. G. Sponenbarger purchased land for \$1.00 an acre. In the Section one mile West of plaintiff's property C. C. Hawkins and DeWitt Poe



bought land for \$1.50 an acre. In Sections 17 and 20 about 2 miles Northeast of plaintiff's property, land the greater portion of which was in cultivation has sold for as low as \$1.00 per acre since 1930. These cutover lands which have sold for \$1.00 per acre would have a market value of from \$15.00 to \$20.00 an acre, and the cleared land would have been worth \$100.00 an acre if they had not been in Boeuf Floodway, or had enjoyed flood protection equal to that of other parts of the alluvial valley. There has been no substantial change in these market values in the vicinity of plaintiff's property since their first loss of value about January 10, 1929.

The Federal Land Bank of St. Louis loaned \$9,153.00 on 120 acres of land about a mile Northeast of plaintiffs' property before the Flood Control Act of May 15, 1928. After the passage of the 1928 Act they foreclosed their mortgage and later sold the property on the open market. In February, 1934, the purchaser from the Federal Land Bank sold a half interest in this land for \$140.00.

Since January 10, 1929, until the filing of this suit in August, 1934, cleared land like that of plaintiff's in this action, in the floodway, has had a market value of from \$10.00 to \$20.00 an acre.

Plaintiff's property has not been overflowed since the passage of the 1928 Act. We have had no threatening floods since 1929. The rain fall over the entire country has been exceedingly low.

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### Cross-Examination.

Witness was attorney for Desha Bank & Trust Company and the Bank of Commerce which failed some time in July or August, 1927, at Arkansas City. The flood of 1927 was the most destructive flood that had ever occurred in that county. The Bank of Commerce was located at McGehee. The Desha Bank & Trust Company failed some time in 1927, after the flood or high water. The Bank of Watson also failed in 1927. The Bank of McGehee failed but afterwards paid its depositors 100 cents on the dollar. Witness was also attorney for the Thane Lumber Company, located at Arkansas City. It failed some time during 1928, about the spring. There were a number of contributing causes to the failure of the Thane Lumber Company. They lost \$250,000 in the flood of 1927, which at least was a very contributing cause to its failure.

There were floods in that county in 1912, 1913, 1916 and 1927. Doesn't think that there was any flood between 1916

and 1927. Since the Cypress Creek Gap was closed in 1921 it (fuse plug line) has never been overtopped. It possibly would have been overtopped in 1927 if the Pendleton and Medford breaks had not occurred.

In the flood of 1927 the overflow water in Arkansas City stood at a depth from 16 to 20 feet. The waters were up to the tops of the buildings. It was a like depth on the Sponenbarger property.

Witness identified photographs of Arkansas City taken during the flood of 1927, which were introduced and admitted in evidence as Exhibits 29, 30, 31, 32 and 33. The Sponenbarger land is within two miles of Arkansas City and a picture taken of the Sponenbarger land at that time would have shown it in the same condition as was shown existed at Arkansas City. Witness lives in Arkansas City but practices law at McGehee and maintains his home at Arkansas City, and has continued to buy lands. Witness was shown photographs taken of part of the Sponenbarger land, showing the main residence. These pictures were offered and received as

Exhibits 34, 36 and 37. These buildings were all washed  
224 away and across the road and it is witness' recollection that 150 houses or more were piled up right there in the vicinity of the Sponenbarger land during the flood of 1927. Witness had about 10,000 acres of land which was in his son's name. He bought this land in the fall of 1928 or spring of 1929. Witness had filed a suit against the Government for taking this land. It was filed in the name of his son. He was seeking to recover \$100.00 an acre for the cleared land and \$10.00 an acre for the non-cleared land. This suit totaled a prayer for judgment in the aggregate amount of \$64,000. Witness did not consider the total consideration paid for the 5,000 acres of land that was in his son's name to exceed \$4,000. He was asking judgment against the Government for \$50,000. He is also interested as an attorney on a contingent basis in a large number of other lawsuits filed against the Government. These suits in which he is interested as attorney aggregate something like a million dollars or more. He does not have an interest in the suit filed by the Missouri Pacific Railroad Company for thirty-four million dollars. After the flood of 1927 the advertisements that they had been putting out to induce settlers and home-seekers to move into that vicinity were discontinued. Approximately 85% of the land down there is uncleared land. The Sponenbarger land and a majority of the other land in the floodway was somewhat burdened with Special Improvement District Taxes. There were 79,771 acres of land deeded to the Southeast Arkansas Levee District in that county in

1924, under decree of foreclosure. During the years of 1925 and 1926 there were 102,000 acres and 79,000 acres that went delinquent for taxes.

225 There was not any general decline in land values after the flood of 1927. There is a period of time after each flood in which you find a stagnation in sales, but the values remain the same. Land values in this area did not decline in 1927 before the passage of the Flood Control Act of May 15, 1928. Land values generally started down in 1930 which affected lands outside this floodway. Land values in the floodway were destroyed before 1930.

I recognize the picture of Arkansas City which you show me inundated during the 1927 flood within 2 miles of the plaintiff's land. Plaintiff's property was overflowed in the same way by the same flood.

It is not true that the same thing happened to the value of lands in the Boeuf Floodway that happened to the country generally in the alluvial valley in Arkansas in that distress conditions generally beginning back in 1929 or 1930 became more acute and destructive all the time until within the last year or two. Our lands in Boeuf Floodway lost their value before 1929 or 1930. I know of no other land in the State of Arkansas on which the United States Government has reserved the right to discharge over it 900,000 cubic feet per second of water.

A great deal of land in this area in the floodway has been sold for \$1.00 an acre. I have bought some lands in this area but have filed no claim for damages against the Government on such recently acquired lands. I think such claims are now barred by the statute of limitation.

#### Redirect Examination.

In former floods such as those of 1912, 1913, 1916 and 1927, when Arkansas City and the plaintiff's property were inundated, the water came from distant crevasses and rose very gradually with no destructive current. Often when the water subsided it left deposits on the land, not in close  
226 proximity to the break in the levee, which were beneficial. Nor were crops lost except in 1927.

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JOHN BAXTER, on behalf of plaintiff, testified:

I live in Dermott, Chicot County, Arkansas, about 18 miles by hard surface road from Arkansas City. Have practiced law for 20 years. Have filed no suits against the Government for any of my clients under the Flood Control Act of May 15,

1928. I am President of a bank in Dermott and am a Director of a wholesale grocery company which for 15 or more years has operated throughout this entire territory. I am President of the Delta Production Credit Association, a semi-governmental relief agency that makes crop production loans in Desha and Chicot Counties. I assisted in the liquidation of the Desha County banks which closed in 1927 and have traveled over the entire area involved in this litigation for a number of years. For about 3 years I was liquidating mortgages held by the insolvent Desha County banks. I have been familiar with real estate values throughout that area since prior to 1927. I have known the plaintiff's property for probably 15 years.

Immediately prior to the creation of the Boeuf Floodway as a result of the Flood Control Act of May 15, 1928, plaintiff's property was easily worth from \$100.00 to \$125.00 an acre. Immediately after it became generally known that it was in the Boeuf Floodway its market value did not exceed \$25.00 an acre. Plaintiff's property has been damaged to the extent of \$75.00 per acre solely by reason of it being placed in the Boeuf Floodway by the Flood Control Act of May 15, 1928. There was no change in its market value after being placed in the Boeuf Floodway up until the filing of this suit in August, 1934.

227 The market value of plaintiff's property was destroyed prior to the general economic depression beginning in 1930. Exceedingly good crops have been grown in Desha County on all land for the last two or three years which has slightly restored market values.

The tax burden on plaintiff's 40 acres of land is not more than \$40.00 a year. A dollar an acre on this land would not affect its value at all because that [it] low taxation. Lands in production can carry the burden easily. The market value of plaintiff's property to which I have testified existed in spite of its tax burden. No indebtedness whatsoever has been added to it since it was put in the floodway. The annual tax burden has recently been lessened in Cypress Creek Drainage District by a refunding program. The loss in market value of plaintiff's property occurred on account of the passage of the Flood Control Act of May 15, 1928, adopting what we call the Jadwin Plan.

Prior to the 1927 flood the property owners of this area had been hoping to eventually have perfect flood control. After the 1927 flood the public press finally carried the news of the adoption by Congress of the Jadwin Plan. Repre-



representatives of the Government later addressed public meetings assembled in the area and explained the engineering plan adopted by the Flood Control Act of May 15, 1928. When this information became generally known nobody wanted to buy lands in the Boeuf Floodway, and the market value was destroyed. There was no substantial change in that condition prior to the filing of plaintiff's suit in August, 1934.

As a banker I know that loan values in the floodway were destroyed. I went to St. Louis to find out what the trouble was and was told that we were in the floodway. Property owners who sought loans on property in the floodway were turned down. The Delta Production Credit Association, of which I am President, just makes annual loans for each year's crop. We will not pledge ourselves to make a loan next year on property in the floodway in the vicinity of the plaintiff's land. We make no loans in that area any year until all danger of flood has passed.

For the last five or six years there has not been sufficient rain fall to give any alarm to the lower Mississippi valley except in 1937, and at that time the Arkansas and White Rivers were very low and so we knew there wasn't any danger of a flood in our section. Had there been a repetition of the 1927 flood, or had there been ordinary flood stages in the White and Arkansas Rivers when the crest of the Ohio flood came down the valley in 1937, undoubtedly the fuse plug levee would have blown out.

The type of population that has gone into that area since the floodway was created are people from the hills who have come to this bottom country and cleared up lands and built homes at no cost to themselves. They have paid nothing for the land and have been out no taxes. They are commonly called "donators" or "squatters". Some of these folks have purchased that land for \$1.00 an acre from the original owner, or the State, or somebody else. Such wild lands were worth \$25.00 per acre prior to the 1928 Act, and cultivated lands were worth from \$50.00 to \$150.00 an acre depending upon location, proximity to schools, roads, churches, towns and other things of that description.

It is the definite policy of my bank, and the other banks in Southeast Arkansas, that we will not make loans on the credit of land in Boeuf Floodway unless the applicant is financially responsible, regardless of that security.

## Cross-Examination.

I was connected with the Bank of Dermott from 1920 to 1929 when it consolidated with the other bank in the town. I have been connected with the Dermott State Bank, as its President, from its organization to the present time. I was attorney for the liquidating agent of 5 banks in Desha County, 3 of which were in the Boeuf Floodway. Neither myself, nor any of my clients are interested directly or indirectly with any of the litigation filed against the United States in the Court of Claims.

The value of lands is affected by the rise and fall of the various commodities which the land produces, especially cotton. Back in 1918-1920, in the war period, lands went very high. About 1923 things got back to normal and rocked along with about the same prices, with gradual and slight increase in this territory, until the passage of the Flood Control Act when it became known that these lands were in the floodway and the price went down. In 1919, the price of cotton was 60c a pound, the highest it has ever been.

There are no lands in adjoining counties in Arkansas comparable to the lands in this floodway. The only land we can compare, are the lands just across the river. The land in the floodway is better. The land across the river, comparable to this land in Boeuf Floodway, suffered depreciation in market value to some extent during the depression, but they have climbed back to normal and are probably of a market value of \$100 to \$125 per acre. Those lands not in the floodway, across the river, were at their peak of market value until the Fall of 1930. Then they went down to a certain extent because cotton went down. The general depression  
230 affected land that was beyond the Boeuf Floodway in other territory, but the price of lands in the floodway had been destroyed before the depression came, and therefore there was nothing left for the depression to destroy in the floodway.

The land in the floodway is just as productive as it ever was. We raised more cotton in 1936, then ever before. The land in the vicinity of plaintiff's land averaged three-fourths of a bale or a bale an acre. Cotton sold for approximately \$70 to \$75 per bale. Last year I expect the gross income of land in cotton and corn would be from \$30 to \$50 per acre, or a net of \$8 to \$10 per acre.

In 1929 cotton was worth 20c to 25c a pound. Land in the floodway had a reasonably relative value until it became known that the passage of this 1928 Act had taken that

ritory into the floodway. It lost 75% of its value in 1929, and early in 1930. In December, 1930, cotton went down to 10c a pound and about 1932, the lowest we have ever had, was about 5c.

W. E. THOMPSON, a witness for plaintiff, testified:

I have lived in Desha County, Arkansas, 25 years, being cashier of the Desha Bank & Trust Company in Arkansas City for 14 years, and cashier of the McGehee Bank since then. I am familiar with market values of lands in the Boeuf Floodway in Desha County. A very large number of sales of land in that area have passed through my hands. I know the plaintiff's 40 acres of land involved in this suit.

Before plaintiff's land was placed on the floor of the Boeuf Floodway by the Flood Control Act of May 15, 1928, it was worth about \$100 an acre. It was actually sold for that. That was the fair market value at that time of other lands already in cultivation in that general vicinity. After it became generally known in 1928, that it had been embodied as a part of the Boeuf Floodway under the Flood Control Act of May 15, 1928, I would say that the fair market value of plaintiff's land was less than \$25 an acre. We sold the place adjoining it, a similar tract of land, for less money. The land on the west side of plaintiff's land was sold in the open market to C. C. Hawkins, who owned an adjoining farm, for \$15 [and] acre.

Putting plaintiff's land in the Boeuf Floodway reduced its loan value to a very small amount, if any. My bank loaned Mr. Sponenbarger money every year, but we did not look to the land alone as security. We would not lend any substantial amount of money on farm lands in the floodway unless to a man to whom we would very likely lend without any security. We made the Sponenbarger loans on Mr. Sponenbarger's ability to pay, and not on the land. That would be true of any other instance that might be found in the floodway where the land happened to be included in a mortgage to our bank.

#### Cross-Examination.

The Desha Bank & Trust Company failed in 1927, before the passage of the 1928 Act. (Rec. 594.)

We had flood water in Arkansas City in 1912, 1913, 1916, 1920 and 1927. There have been no floods in this country since 1927. The Government rebuilt the Arkansas River levee down to about Yancopin and has built a new set-back levee from Arkansas City 8 or 9 miles north.

The plaintiff has cultivated her land every year since the passage of the Flood Control Act. I have no interest in any of the suits filed against the United States. I do not own a foot of land in the floodway.

No man would want to make a home on land in the floodway, nor make any permanent improvement. The land may be flooded any time the Government likes and the stage of water justifies, and this constant threat of floods and serious damage to the improvements, and even to the soil itself, would keep the land from going very high in market value.

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JUDGE J. L. PARKER, on behalf of plaintiff, testified:

I have lived in Arkansas City 32 years, and was judge of Desha County Court for several years. I have been in the banking, mercantile and farming business. I own De Soto plantation, about 6,000 acres, beginning about 5 miles north of Arkansas City. About 3½ miles of the north end of the new set-back part of the fuse plug levee runs directly through my plantation. As a banker I have been interested in the real estate values in that section. I was a member of the board of the Southeast Arkansas Levee District for a number of years. I am thoroughly familiar with the levee protection of that area, and with agricultural values.

Prior to 1921, during high water, water from the Mississippi River would flow through the levee gap at the mouth of Cypress Creek and inundate lands in that vicinity. These waters would reach the vicinity of plaintiff's land gently and gradually, not coming with a rush. They left a deposit of soil on the lands that was really beneficial to it, and did not wash away fences or destroy the houses or hurt the soil, and we did not lose crops from overflows. In fact through the ages past this territory of fertile Mississippi valley alluvial soil was built up by deposits from flood waters coming over these lands for thousands of years. After the outlet at the mouth of Cypress Creek was closed we had no further overflows prior to the disaster of 1927, which came down to us from the Arkansas River. The fuse plug levee was not overtopped or crevassed by the 1927 flood. The water began to recede when the levee broke in the State of Mississippi opposite Arkansas City.

None of these floods prior to the passage of the Flood Control Act of May 15, 1928, materially impaired the market value of lands in that vicinity. Woodland had reached a market value of from \$25 to \$40 per acre,



and cultivated lands had been sold from \$80 to \$125 per acre. The land was fertile and market values were constantly rising notwithstanding the overflows mentioned because we were constantly building levees and the engineers kept telling us that eventually we would get protection that would absolutely keep these waters off our lands. We knew we had the finest lands in the world. The final step for the protection of our land from the Mississippi River overflow waters was closing the Cypress Creek in the levee line.

We created the Cypress Creek Drainage District and bonded our lands for \$3,500,000 to divert the Cypress Creek water which was going through the levee gap into the Mississippi River and then closed the gap. We thought the closing of that gap would hold the overflows from us.

I have been personally familiar with plaintiff's 40 acres of land for 32 years. It is deep, alluvial soil; none better in the valley anywhere. It was located on an interstate, improved highway, accessible to Arkansas City for schools and trucking market. The location made it extremely valuable. Before the passage of the Flood Control Act of May 15, 1928, a fair market value of the plaintiff's land was \$100 an acre. She paid that for her land in cash. That was a fair market value of similar lands in that vicinity for several years. After purchasing her land the plaintiff built houses and fences on the land and improved it.

After the passage of the Flood Control Act of May 15, 1928, information of its effect was disseminated by Government officers in public meetings of property owners late in the summer of 1928. Then we just forever gave up hope. After it became generally known that plaintiff's land was in the Boeuf Floodway it had no value. Today she might get \$25 or \$30 an acre for the property. I would say that 234 the market value of plaintiff's land when she filed her suit in August, 1934, was \$25 an acre. It has not exceeded that value since the passage of the Flood Control Act of May 15, 1928.

In 1929 the country generally was enjoying a wave of prosperity. Cotton was 18c a pound. 1929 is commonly referred to as the boom year, but values in the Boeuf Floodway were at a very low ebb in 1929. I bought the De Soto plantation, 6,000 acres, about 5 miles north of Arkansas City, in the floodway, in the Fall of 1929. I paid \$5,000 for this 6,000 acres, about 85c an acre. It had no value because it was located in this floodway. Before this plantation was put into the Boeuf Floodway by the Flood Control Act of May 15, 1928, it had a fair market value of \$150,000.

My lands are right at Possum Fork in the vicinity of Lucca Landing on the Mississippi River. That point of the levee has always given a lot of trouble. The levee is built right across the bed of that creek, Possum Fork, where the soil is sandy. The seepage is heavy and we have had several slides at the Possum Fork levee.

In October, 1936, I sold a section and a half of my land to Mr. Kemp for \$4.50 an acre. It is very fine land and had a market value of \$40 an acre before it was put in the Boeuf Floodway.

Three years ago the Resettlement Administration of the United States Government inspected my property with a view of buying it. They were carried away with the fertility of the soil and were interested in the property until they went to the Vicksburg office of the Army Engineers and learned that the property was in the floodway. That absolutely killed the sale. They were no longer interested in it because it was in the Boeuf Floodway.

#### Cross-Examination.

When I bought the De Soto plantation approximately 235 600 acres was in cultivation and 5,400 acres was cut-over woodland. It carried a fixed assessment for levee and drainage taxes of 90c an acre in addition to the State and County taxes, except 1,500 or 2,000 acres of the land which lies east (river side), of the levee which carries a tax of 10c or 15c an acre.

I signed a statement which you show me dated February 20, 1935 prepared by Judge Kirten, an attorney for the Government, but do not remember reading the statement. In answer to the question, "What effect did the 1927 flood have on the saleable value of the (Sponenbarger) land?" the statement recites the answer: "We have had floods before, and they did not do so much damage, but the 1927 flood was extreme. . . . The flood destroyed the value of the land." And in answer to the question: "What effect did the flood waters of 1927 have on this (Sponenbarger) place?" the statement recites: "It destroyed the value of it. The flood destroyed the value."

I do not remember the statements I made to Mr. Kirten at the time, and did not read the paper. Mrs. Sponenbarger's land before the flood was worth \$100 an acre and I meant after the Flood Control Bill it had been destroyed.

I sold the United States 420 acres of my land for right of way for the set-back levee through my property. They paid

me \$50 an acre for the 114 acres of cleared land in the levee right of way, and \$20 an acre for the 314 acres of woodland. The Tensas Basin Levee Board of Louisiana bought this land last year for the Southeast Arkansas Levee District.

### Redirect Examination.

When I signed that statement in 1935, for Judge Kirten, the outstanding thing in my mind, and in the minds of all the property owners down there, was what had happened to that vicinity. The spillway has been in our minds ever since they passed the Bill. We are in the floodway down there and our property has gone to nothing. You get three men together and they will be talking about the spillway  
236 down there. That floodway down there has destroyed not only the values of the Spokenbarger land, but it has destroyed the values of all the land down there.

I tried to get all I could for the right of way for the setback levee. I knew the property was worth a whole lot more money and figured they had to pay me to compensate me for part of the loss that I had received on that property from the spillway. They paid me about half the value the property had before it was put in the spillway.

The 1927 flood washed the fences and houses away on the Spokenbarger land, but did no physical damage to the land itself. It did not damage the fertility or productivity of the soil, and did not damage the market value of the property a particle prior to the time it was put in the floodway.

This is strictly a cotton country, and cotton fixes the value of farming land in this area. Take out the cotton, Negroes and mules and you haven't anything left.

The general economic depression that began in 1930 did not account for any of the loss of the market value of the plaintiff's property. She did not have anything to lose. She had already lost everything she had. You can't kill a dead dog. The market value of her property had already been ruined. There is something radically wrong when these fine lands are selling from six bits to a dollar an acre.

We have had the same tax burden on these lands for years while the market values have been increasing. No bonds have been issued in the territory since 1927. The plaintiff has paid her taxes all along up to date. Notwithstanding the tax burden, the cleared land in this area, had an actual market value of from \$100 to \$125 per acre just before it was put in the floodway.

It costs from \$40 to \$50 an acre to put this cutover land into actual cultivation.

237 The damage caused by the passage of the Flood Control Act of 1928 is to some extent the damage of fear of what may happen in the future. There has been no physical damage as yet growing out of the operation of this project. It has destroyed our hope. Now we cannot have, or hope to have, our levee at the same strength or height they have on the other side of the river, and above and below us. It is the uncertainty of the thing. They could hold a gun on you and it wouldn't hurt you if it didn't go off, but you would not be comfortable. The same proposition applies to this floodway. It is loaded and is liable to go off, and it is not a comfortable feeling to live in that floodway.

Since this property has been put in the floodway I have not been able to borrow a ten cent piece on that land.

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238 J. L. FLOWERS, on behalf of plaintiff, testified:

I am 70 years old and have lived in Texas for the last 29 years. I never lived in the State of Arkansas.

I bought a section and a half of cutover timber land in 1918, in Desha County, Arkansas, about 6 miles southwest of plaintiff's land, in what has now become the Boeuf Floodway. I bought the land from Jackson and Vreeland, land agents who were selling lands in that community. Quite a large part of that area was being offered on the market when I selected the land which I bought. I am a stock farmer, and the land I bought was susceptible of being put into cultivation. I still own that land. Since owning it I have paid \$13,800 on it in taxes. (Over the objection and exceptions of plaintiff, the Court refused to permit the witness to testify that he paid \$40 an acre for the land).

Over the objection and exceptions of plaintiff, the Court refused to permit this witness to testify that his land had had no market value whatever since it became generally known that it was in the Boeuf Floodway.

#### Cross Examination.

I have filed suit against the Government for \$17,640.

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HOWARD L. CLAYTON, on behalf of plaintiff, testified:

I am the Sheriff and Tax Collector, of Desha County, Arkansas, where I have lived all of my life, 36 years. I have



been in actual charge of handling tax collections and records thereof since 1922, and am generally familiar with land values in Desha County. I have personally known the plaintiff's land involved in this suit since 1923. I own similar land in that vicinity.

239 Immediately prior to the time it became generally known that plaintiff's land had been placed in the Boeuf Floodway as a result of the Flood Control Act of May 15, 1928, the fair market value on plaintiff's land was \$100 to \$125 an acre. Immediately after it became generally known that it was placed in the floodway, plaintiff's land had practically no value. That was true of all the land of that type and character in that immediate vicinity in the Boeuf Floodway.

About 2 years ago I bought 480 acres of cutover timber land of the same general type, character, fertility, productivity, and general location as the plaintiff's land, just one-fourth of a mile away. I have put 300 acres of this land into cultivation, costing \$30 to \$40 an acre. The fair market value of that type of land in that locality immediately prior to the passage of the Flood Control Act of May 15, 1928, improved cultivated land like the plaintiff's land, was from \$100 to \$125 an acre. Since it became generally known that it was in the floodway it had practically no market value; which condition continues to this date.

Over the objection and exceptions of plaintiff, the Court refused to permit the witness to testify that after the creation of the Boeuf Floodway he was unable to collect taxes on property in the floodway because the owners had been deprived of flood protection.

#### Cross-Examination.

I reckon I was gambling by spending \$35 or \$40 an acre putting this land which I purchased into a state of cultivation, but I made a bale of cotton to the acre last year in the stumps. It will take from 4 or 5-years to get the stumps out of it.

I have filed no suit against the Government.

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A. C. ZELLNER, on behalf of plaintiff, testified:

I have lived in Desha County Arkansas since 1922. I own about 4500 acres of land in the Boeuf Floodway about  
 240 12 miles above Arkansas City, and about 12 miles below Yancopin. All of my land is in cultivation. I am a member of the Southeast Arkansas Levee District Board.

I have known the plaintiff's land since 1922. In productivity, fertility, drainage, and elements that enter into farming values, and values for agricultural purposes, the plaintiff's land is practically the same as mine. Immediately prior to the time it became generally known that plaintiff's land had been put in the Boeuf Floodway as created by the Flood Control Act of May 15, 1928, the fair market value of her property ran between \$100 and \$125 an acre, maybe a little better than that. That represents a fair market value of cultivated land of that type in the vicinity at that time. After it became generally known that plaintiff's 40 acres of land was in the Boeuf Floodway you might say it had no value. Some man might come along and buy it and operate it and get a crop off of it. That condition of market value in that immediate vicinity has continued up until the present time.

When I acquired my interest in my land in 1922, it was subject to a mortgage indebtedness of \$25,000. At that time practically 300 acres of the land was in cultivation and the balance was cutover timber land. The mortgage debt ran around \$50 [and] acre for the open land and \$20 an acre for the cutover land. I paid off the mortgage debt in 1925. Since the passage of the Flood Control Act of May 15, 1928, neither my land, nor any land in the floodway in the vicinity of the plaintiff's land, has had any loan value on which money can be borrowed.

#### Cross-Examination.

241 I do not think the flood of 1927 had any effect on the market value of these lands. Cheap cotton, high taxes, bonded indebtedness, mortgage indebtedness, depression, and general trouble has been on the land before and did not affect it up until the time it was put in the floodway, so I don't see why they could materially affect the market value then. I went through the very destructive 1927 flood, but have not been in that community before. The 1927 flood damaged improvements and personal property but was not injurious or damaging to the land. We didn't make any cotton crop that year because the water lasted until August. The 1927 flood didn't affect the market value of the land so far as permanent impairment.

242 TURNER NEAL, on behalf of plaintiff, testified:

I have lived in Desha County, Arkansas, 24 years. I have recently become a member of the Board of Directors of the Southeast Arkansas Levee District. My business has always been farming and stock raising. Since 1912 I have

owned 160 acres of land about 4 miles Northwest of the plaintiff's property, all in cultivation. In 1934 I bought another place North of Arkansas City, against the fuse plug levee, of which about 400 acres are in cultivation. Before I purchased any property in Desha County it was generally understood that the Cypress Creek Levee gap would be closed and that country would be protected from flood.

I have been familiar with plaintiff's 40 acres of land for 24 years. Immediately prior to the passage of the Flood Control Act of May 15, 1928, the fair market value of plaintiff's land was \$100.00 to \$125.00 an acre. As soon as it became generally known in that community that it was in the Boeuf Floodway as created by that Act of May 15, 1928, plaintiff's land has had very little market value. It might have had some market value for growing timber and grazing purposes, but it had very little for agricultural purposes. There has been very little material change in the market value of any agricultural land in the floodway in the vicinity of plaintiff's land since the floodway became known in 1928. General information about the floodway was circulated in the newspapers and through agents of the Government visiting in that country who explained it.

No part of plaintiff's loss of market value can be fairly attributed to the economic depression which began in 1930 because it was generally known that plaintiff's property was in the floodway and it had lost its value before the depression came.

243 The former floods which had overflowed plaintiff's property had not permanently affected the market value of her land.

The total acreage of my lands North of Arkansas City is 1,057 acres. It has all now been thrown outside of the recently built set-back levee, placed in the river, which has destroyed all of its value. I do not now expect to put any more of that land in cultivation.

#### Cross-Examination.

Former floods caused a visible loss in the way of fences and houses and things like that, but did not disturb the value of the land. The whole floodway depends largely upon the protection of the levee. When I first moved there plans were already under way to close the levee gap. We had reason to expect some water until the levee system had been completed and the gap closed. We looked forward to the time when that country would have complete protection by

a levee. As it is now our chances of not getting water have been taken out of the picture. It is made a certainty that we will get water if it comes.

I have authorized the filing of a claim for damages against the Government.

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GUY COURTNEY, on behalf of plaintiff, testified:

I have been engaged in the mercantile business and farming in Desha County, Arkansas, for 40 years and know the market value of farming lands in that vicinity. For about 20 years I have known the plaintiff's property which lies two miles West of Arkansas City, the county seat, to which I frequently go. I own land in the Boeuf Floodway.

The fair market value of plaintiff's 40 acres of land before it was put in the Boeuf Floodway was \$100.00 to \$125.00 per acre. After it became generally known that the property was in the floodway it didn't have any value—  
244 something like \$15.00 to \$20.00 an acre.

#### Cross-Examination.

I have gone through all the floods which have inundated that country during the past 40 years. The 1927 flood was a very destructive flood. I was broke before the flood of 1927. When my land got in that floodway, there wasn't any value. I think myself and family are suing for \$120,000.00.

#### Re-Direct Examination.

The water which flooded these lands before the levee was closed at Cypress Creek Gap was run-around water which came in slowly and did no damage. It helped the land because of the sediment.

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T. A. PREWITT, on behalf of plaintiff, testified:

I live in Drew County, Arkansas, where I have been engaged in the mercantile business and farming for 50 years, all my life.

I was President of the Southeast Arkansas National Farm Loan Association which was organized with the aid of the Federal Government for the purpose of borrowing money on farm lands as security through applications made directly to the Federal Land Bank. We made 50 or 60 applications to the Federal Land Bank for loans on property in the Boeuf Floodway, and not a single loan was made because the prop-



erty was in the Boeuf Floodway. I made persistent and continued efforts to change this policy of the Federal Land Bank, by trips to St. Louis, in person and with a party, and by correspondence. After three or four trips to St. Louis we went to Washington and conferred with the heads of the Federal Farm Administration. We were never able to secure a change of the policy of the Federal Land Bank that no loans would be granted to property on the floor of the Boeuf Floodway.

245

#### Cross-Examination.

The Federal Land Bank did make some commissioner's loans in that area. Such loans were not made through our organization. I secured a commissioner's loan the latter part of 1934 on my land 5 miles Northeast of Tillar. It is not within the limits of the Boeuf Floodway as shown on the map.

#### Re-Direct Examination.

I cannot name a single loan ever made by the Federal Land Bank in the area of Boeuf Floodway in Desha County. When our organization was seeking loans the Federal Land Bank declined all our applications.

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BURK MANX, on behalf of plaintiff, testified:

I have lived in Forrest City, Arkansas, all my life, 47 years. I am a lawyer and during my adult career have been engaged in the operation of buying and selling real estate, both farm and city property, on quite a large scale. I represented the Missouri State Life Insurance Company of St. Louis, the Commonwealth Insurance Company of St. Louis, and was President of the Monarch Investment Company, all of which had extensive holdings of farm lands in Desha and Chicot Counties, Arkansas, of which I had personal supervision. The latter part of 1927 I was employed by the Southeast Arkansas Levee District and the Cypress Creek Drainage District to supervise the collection of taxes and look after the foreclosure of delinquencies, and attending all meetings of these Boards and courts for several years. I have been connected with banking and insurance interests with large operations scattered over the State of Arkansas, which have made me familiar with real estate values generally in that State. From personal observation and experience I am familiar with the area in Southeast Arkansas now covered by the Boeuf Floodway. I have known the plaintiff's 40 acres of land in Desha County about 2 miles West of Arkansas

246 City on the concrete highway since 1926. I was interested in surrounding lands in that vicinity.

In 1927, before this land was placed in the Boeuf Floodway by the provisions of the Flood Control Act of May 15, 1928, plaintiff's land was worth \$100.00 an acre. With the improvements which plaintiff placed on her land it was worth \$125.00 an acre. After it became generally known in that vicinity that plaintiff's property was in the Boeuf Floodway I imagine it is worth between \$15.00 and \$25.00 an acre. I would not want to buy any property in the Boeuf Floodway, because I don't think it has any value, really. That condition has continued up until this time.

#### Cross-Examination.

I attribute the decline in market value solely to the adoption of the Flood Control Act of May 15, 1928. I don't think the economic conditions had anything to do with it in a permanent way. When the land was put in that spillway, and gave the Government an easement, the right to put water across it, and the ownership was subject to that easement, I think the value of the land was destroyed.

The low price of cotton, overlapping of taxes and heavy tax burdens, and general difficult economic conditions, to a certain extent adversely affect market value, but the farmer who carries a reserve does not pay much attention to economic fluctuations in land values because they come back if you are able to hold them. If one is in financial distress of course that would affect it, but no man who has any reserve pays any attention to slight fluctuation because of economic conditions. During the depression in 1930 there were people practically everywhere who had to put their lands on the market and take what they could get for them. Some lands could not be bought because the owners would not sell them, especially good fertile land. Land below Marianna subject to back water could be bought cheap. Some river bottom land subject to overflow is the very highest price land.

The price of a bale of cotton ranged from \$60.00 in 1926 to about \$100.00 in 1929, then down to \$30.00 in 1932, and back to about \$60.00 in 1934. Some farm lands fluctuate with these prices. If I had owned a piece of land in this floodway and had not known about the passage of the Flood Control Act in 1928, those fluctuations would not have bothered me. Farmers are the most optimistic people on earth. They think that next year is going to put them on their feet. People with

money do not let these economic fluctuations bother them, because it has been my observation that if anybody can hold lands such as these they always come back whether it is worth \$10.00 an acre or \$100.00 an acre.

The Missouri State Life Insurance Company, under mortgage foreclosures, acquired large areas of land all over Arkansas and in other States. 21% of their assets were in real estate. The rest was in bonds and stocks and other things. Their land holdings did not break them. They never lost any money on Arkansas lands because I refused to sell it when the price was below what I thought it was really worth. Land values are now back to about 82% to 90% normal due to conditions being better generally. When people are getting money they will buy land. The people have more money than they have had in this country since 1930.

#### Re-Direct Examination.

After plaintiff's property had been placed in the floodway in 1928, it had no substantial market value in 1929 when cotton was selling at 18c a pound. I think the value of that land was gone. Nobody could borrow any money on it nor get insurance on it. I couldn't figure why anybody would buy it. I do not think the economic conditions would have anything to do with property in that floodway. I do not think property in the floodway would be able to participate, or take  
248 part in, the general upturn and return to prosperity.

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B. C. PREWITT, on behalf of plaintiff, testified:

I am a farm manager and partner in the firm of Tillar Mercantile Company, merchants and planters farming approximately 16,000 acres of land. I live in Tillar on the Desha County line. I have had farming interests, and have been familiar with farming values, in Desha County, for 25 years. I am familiar with plaintiff's 40 acres of land, and its fertility, productiveness and general desirability from the farmer's standpoint.

Before plaintiff's 40 acres was placed in the Boeuf Floodway by the Flood Control Act of May 15, 1928, its fair market value was \$100.00 per acre. When it became generally known that it had been placed in the Boeuf Floodway, its fair market value was around \$20.00 an acre.

In December, 1933, I bought the land adjoining the Spokenbarger 40 acres on the North and East sides, of the same type and character as plaintiff's land. I paid \$20.00 an acre

for it in 1933. Immediately before it was placed in the floodway it was easily worth \$100.00 per acre.

### Cross-Examination.

I have recently offered \$30.00 an acre for land adjoining my land, nearer Arkansas City, that is within the proposed ring levee to be built around Arkansas City with levee protection, but could not buy it. (Rec. 754, 757).

I bought 80 acres of land in the floodway in the same neighborhood for \$5.00 an acre. The value of this particular land declined largely due to the Flood Control Act of May 15, 1928.

I am trying to buy more land in the floodway. That land is also directly affected by the provisions of the Flood Control Act of June 15, 1936, which provides for the payment of flowage rights. I am gambling. I am betting on some money somewhere and am going to be disappointed if I don't get it. That is exactly why I am buying it. This land was worth \$100.00 an acre before it was put in the floodway and I think the Government is going to pay something for it.

I have a suit against the Government for \$18,400.00. I have no interest in any other suit at all.

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JUSTIN MATTHEWS, on behalf of plaintiff, testified:

I have lived in Little Rock, Arkansas, for 34 years, prior to which time I lived in Southeast Arkansas, and am generally familiar with the territory of Desha County. I was formerly on the Arkansas State Highway Commission when we constructed roads through there. For the last 20 years I have been in the real estate development business. I am a member of the Executive Committee of the National Real Estate Board, and have tried to keep abreast with real estate values.

I have been personally familiar with the plaintiff's 40 acres of land for more than 30 years, and am thoroughly familiar with the surrounding lands. Before it was placed in the Boeuf Floodway in 1928 I think the plaintiff's 40 acres of land was worth about \$100.00 an acre. Immediately after it was put in the Boeuf Floodway it wasn't worth more than \$20.00 an acre, if it was worth that. I attribute that destruction of its market value to taking it for this floodway.

I am familiar in a general way with economic conditions, the values of commodities, and such things. The change of values generally will not change the situation as to the mar-



ket value of plaintiff's land so long as it remains in the Boeuf Floodway, unless after a long term of years they build  
 250 reservoirs so that the floodway would never fill up. Maybe within a quarter of a century we might decide it is not going to be the channel of the Mississippi River, which I think it is going to be.

### Cross-Examination.

The decline in the market value of this land in the floodway was due solely to the passage of the Flood Control Act of May 15, 1928. No other land began to decline as early as that land did, and the bottom went out of it. Everybody became alarmed that they were going to be made into a floodway, and the land would be taken, and the amount that was left would be sanded or would make blue holes.

Our land in Pulaski County, near Little Rock, beginning in 1926, went up along in 1928 and 1929, and then values all over the State went down until 1934. The 1927 flood disaster did not cause the land in the flood area to decline. We had a lot of land that was overflowed by the Arkansas River which did not go down. These lands had floods right along up to 1916, which was a big flood, and kept on going up in value in spite of these floods.

When Congress passed a bill that limits the height of a levee and lets the rest of them be built up high, that makes the flood certain.

If the fuse plug levee had not been there, the plaintiff's land would have suffered a decline from the effect of the market, but when they left the fuse plug you destroyed the value. You don't have anything to suffer. Good agricultural land does not fluctuate like other land. If a man is making good crops and getting fair prices he would not have it on the market at all. There is just a small amount of this high grade black land with 40 feet of silt, like plaintiff's land, and it is one class of property that does not decline very much.

251 ROBERT A. ZEBOLD, on behalf of plaintiff, testified:

I have lived in Pine Bluff, Arkansas, about 13 years, having come to this State for the purpose of looking after lands in Southeast Arkansas, which had been mortgaged to a company with which I was associated in Oklahoma. Desha County was in our loan area, and I attempted to familiarize myself with all the properties on which we had loans in South-

east Arkansas. I became familiar with the market value of farm lands in that territory. I own myself about 1600 acres of land in Desha County of which 103 acres is in the Boeuf Floodway. I know the location, condition and general characteristics of plaintiff's 40 acres involved in this litigation.

Plaintiff's land was worth about \$100 an acre just prior to the time it was placed in the Boeuf Floodway by reason of the Flood Control Act of May 15, 1928. It was improved farm land. Immediately after plaintiff's land had been placed in the Boeuf Floodway in the years 1928 and 1929, it was probably worth about \$10 an acre. At that time, especially during the year 1929, market values of other farm lands outside of this floodway were advancing until the break in 1930. No part of the loss in market value of plaintiff's land, and land in that vicinity, can be attributed to the economic depression which began in 1930, because their market value had already been destroyed before the depression started.

No part of plaintiff's loss in market value can be attributed to the tax burden because plaintiff's land was wholly in production and she was paying her taxes and was not disturbed by \$1 an acre tax.

#### Cross-Examination.

The tax load did depress market value of unproductive land that could not carry the burden.

252 I have a suit against the Government for \$9,000, but am not interested in any other suits.

E. E. HOPSON, recalled for further cross-examination, testified:

I am interested as an associate attorney with Mr. Lamar Williamson, in a large number of claims which have been filed in the Court of Claims, seeking compensation for property in the Boeuf Floodway taken by the Government under the Flood Control Act of May 15, 1928.

Plaintiff rests.

Whereupon, the defendant, to sustain the issues on its behalf, proceeded as follows:

W. H. MATTHEWS, on behalf of the defendant, testified:

• I live at Lake Village in Chicot County, Arkansas, and am one of the joint owners of the Macon Lake plantation on Highway 65, 8 miles north of Lake Village, and about 18 miles from Arkansas City, located within the Jadwin Plan

Spillway. I purchased my interest in that place in 1934. 2,867 acres of the 6,113 acres are in cultivation. My partner, J. L. Cain, bought the place in 1927. The land sold in 1927 for \$129,000. A main State highway runs through the place for 3 1/2 miles. It is a railroad shipping point on the Missouri Pacific railroad. The place is well improved with dwellings, houses, wells, fences and a cotton gin. In 1936, we made 1100 bales of cotton on 1,037 acres, worth \$80 a bale. In 1936 we were offered \$37.50 an acre for the land and declined the offer. The land is behind the fuse plug levee. I do not regard the adoption of the Flood Control Act of 1928, as having had any appreciable effect upon the market value of this land. Since we purchased this land we have cleared about 150 acres of additional land and made additional improvements on the place including repairs to the gin which is one very large item.

As Receiver for the Macon Lake plantation at the time those claims were being filed against the United States in the Court of Claims, by direction of the bondholders committee in St. Louis, I filed a claim. My partner and I do not desire to press this claim, nor to claim that we have been damaged in any amount by the passage of the Flood Control Act of May 15, 1928. In December, 1934, we borrowed two commissioner's loans, of \$7,500 each through the Federal Land Bank, and in December, 1935, completed the loan with Jefferson Standard Life Insurance Company for \$57,500.

#### Cross-Examination.

I lived in Mississippi prior to 1928, when I came to Macon Lake as an accountant. Mr. Cain and his associates bought the land in 1927, because its then owners couldn't discharge their indebtedness and it had to be sold. In 1934, I had to deal with the Trustee who was acting for the bank that had a mortgage on it. The bondholders filed suit in Federal Court in 1932, and I was appointed Receiver in April, 1933. Mr. Cain bought the land at a forced mortgage sale.

I do not know the plaintiff's land and am unable to compare the market value of the plaintiff's land with the Macon Lake place.

Mr. George Armstead of Little Rock was the attorney for the bondholders who filed the suit for me as Receiver in 1934 in the Court of Claims. I brought the Complaint to Mr. Armstead and signed the affidavit that the cleared land had been damaged \$100 an acre, the entire demand being for \$283,432. (Rec. 814-816.)

I have not heard of any loan being completed in the floodway area through the Federal Land Bank after the property had been put in the floodway.

"Q. I believe your testimony is now to the effect you do not believe the property in this floodway, the market value of the property in that floodway, has been affected at 254 all by being in the floodway?

"A. Damn it, No sir, I don't think it has been damaged by being in the floodway."

We are protected from the flood waters of the Mississippi River by the fuse plug levee. I think the War Department will hold that levee there, look out for it. I haven't heard what stage they would hold it to. I would think they would go ahead and fight against the Mississippi side.

"Q. You don't believe, do you mean, that the engineers are going to let your land be flooded any more?

"A. Well sir, they came in there this year and protected us."

Our lands are also in the new floodway under the Markham Plan. They claim they will let the water in the new floodway on a certain height on the Arkansas City gauge. I did not know that it was exactly the same height fixed by the Flood Control Act of May 15, 1928, namely, 60.5 on the Arkansas City gauge.

I don't think the land is damaged at all until the damage has occurred. If the Government stands there and lets that fuse plug go out I think the Government would pay all the damage done.

I think the market value of Macon Lake plantation, which is in the Boeuf Floodway, has not been affected because it is protected, and has the same protection as the land outside the floodway over west of the Missouri Pacific railroad.

In my opinion, flowage rights under the Jadwin Plan are not worth anything. If they let water get in the floodway under the Markham Plan I think the flowage rights are worth something. Under the Markham Plan we would get water more often. It would change the fuse plug levee.

I have been approached by the Government to enlist my services as an appraiser of the flowage rights that the Government is seeking in the floodway. My understanding 255 is they don't know whether they are going to pay flowage rights, or buy the floodway outright, under the Overton Bill passed last June. I think they should pay some flowage rights if they are going to use it under this new



Overton Bill. I don't think that would affect the market value of the land.

The morning paper reporting me as one of the committee appointed by the United States Engineers to set up an office in Lake Village for the purpose of taking options for flowage rights in the proposed Eudora Floodway in Arkansas and Louisiana under the Overton Act (Flood Control Act of June 15, 1936), is true.

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J. L. CAIN, on behalf of defendant, testified:

I lived in Mississippi prior to coming to Arkansas 9 years ago since when I have lived on Macon Lake plantation 8 miles north of Lake Village in Chicot County, Arkansas. I am a partner of Mr. Matthews who has just testified. I have been a farmer all my life. I acquired this 6,113 acre plantation in 1927, of which 3,000 acres is in cultivation. I bought a one-half interest in the place for the mortgage indebtedness aggregating \$129,000. We were offered \$37.50 an acre for the place in 1936, but did not accept the offer. I couldn't think of a place that would suit me any better, and felt like it was worth that figure, and maybe more. The offer was made by Mr. Frank Masters for the Resettlement. (Rec. 828-833.). I do not know whether or not he had any authority from the Resettlement Administration to make that offer. We didn't want to sell and I didn't ask him.

The price of cotton went down in the Fall of 1929, as I recollect and still down in 1930, 1931 and 1932. I think it started up again about 1933. I cannot say about the land values that followed. I don't remember the date after 256 that. The price of cotton has everything to do with land value in that area. When the cotton went to the lowest figure I don't imagine you could have sold a piece of land in that neighborhood or any other neighborhood, that grew cotton.

All the land I own is in the floodway. The Jadwin Plan did not reduce the value of our land. We finally got the loans on our land described by Mr. Matthews in 1934 and 1935. The stagnation was pretty general. Those were just as hard in Mississippi as in Arkansas.

#### Cross-Examination.

I have never lived in Desha County, Arkansas, the county in which plaintiff's land is located. I am not familiar with market values in Desha County prior to 1927. I did not pay any cash for the lands I bought in Arkansas in 1927, but just assumed the mortgage debt.

I borrowed the money mentioned on these lands after the plaintiff's lawsuit was filed in August, 1934.

I had just as soon have land in the floodway as out of the floodway because after they have completed the floodway these lands in the floodway are going to be paid a reasonable price for it, and we will have a protection more than the others on the outside. If the Government takes any of my land to use it in a spillway I expect pay for it. I do not feel that my land is in either one of the spillways. I feel like I am only in the proposed spillway. We have been protected.

I had some conferences with the Army Engineers at Vicksburg. My statement that the floodway has had no effect on the market value of my land is based first on the fact that I do not think we are yet in any operative spillway, and second when we get in an operative spillway and my property is actually damaged the Government will compensate me. That is the way I feel about it.

257 Any time you turn the Mississippi River on a piece of land you are going to damage that land. We all know that. I do not think the Jadwin Plan will be used. I don't think you can make people believe that there is a threat to turn the river on our land.

In 1937, everybody got ready for the flood on both sides of the river. If the Arkansas and White Rivers had both been at flood stage the property would have been flooded.

### Redirect Examination.

The Macon Lake plantation on which I secured a loan is my home and is well improved. On it are two residences worth from \$6,000 to \$10,000, a store building, a gin worth about \$18,000, a new barn worth about \$2,500, and about 100 two and three room tenant houses.

It is in one drainage district, and one levee district. In my conferences with the Federal Land Bank seeking a loan they talked with me about our drainage district, our levee district, and general conditions along that line. They did not mention the floodway.

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GEORGE F. DAVIS, on behalf of defendant, testified:

I have lived in Lake Village, Chicot County, for about 34 years, during which time I have engaged in the real estate business. At present I am in the automobile business. I am acquainted with the country in general.

I do not think the passage of the Flood Control Act of May 15, 1928, had any effect on the market value of land in the spillway for the reason that land values had slumped some 6 or 7 years before that. We had no special values after that slump. Our slump in land came about 1921, and there has not been any land business of material value down there since. The levee taxes increased to 30c an acre and drainage districts were created which made the taxes so heavy that people quit buying land. I think that was the main cause of our trouble down there. The lumber companies cut the timber off the lands and then let the cutover lands go to the State so that the best land in Chicot County could be bought for \$1 an acre.

The 1927 flood did not have any effect on the market values of our land because our values were gone before that flood. We now own about 3,000 acres in the floodway.

#### Cross-Examination.

We have never handled any lands in Desha County. I have always lived at Lake Village, the county seat of Chicot County. The slump in land values came about 1921 when the Government closed the levee line at the mouth of Cypress Creek and gave the area in the Boeuf Floodway down in our community that levee protection against the "run-around" waters which previously had entered through this opening in the levee and overflowed our lands. That made them slump.

I would absolutely oppose any floodway that would endanger our property. The Jadwin Plan has been abandoned. I base my testimony and conclusions on this premise that the Jadwin Plan has been abandoned and I know we are not in the floodway.

During the 1937 flood, while the water was 300 or 400 miles away from us, by reason of information which came from Washington, a large number of folks prepared to evacuate the floodway area. The United States Army was putting up refugee camps to take care of the inhabitants. Houses were boarded up ready for the people to get out. I thought it was very foolish for our people to sell their chickens and cows and move away, and never thought the water was going to reach us by reason of the cut-offs in the Mississippi River, and other things. This threat of being flooded scares people to death. It had not a particle of effect on the market value of the lands.

If the Arkansas and White Rivers had been in flood stage in 1937, when the crest of the Ohio River flood came down I

still think we would have been protected in our community because the Government can come in there and help the 800 or 900 men there build up the fuse plug levee 3 or 4 feet higher and take the water down the river past Chicot County. I believe the Government Engineers would build up this levee with bags of dirt to hold the water 4 or 5 feet above the levee if necessary.

Good times down in the Delta country are fixed by the price of cotton as a general thing. Last year was a miracle year in so far as production in Chicot County was concerned. It was the largest cotton crop we ever had and the prices were high.

#### Redirect Examination.

I understand that there has been no change in the height of the fuse plug levee but I think the cutoffs in the river have saved the situation for us.

#### Recross Examination.

These cut-offs between Arkansas City and Lake Village were constructed in the last year or two.

As I understand, the Boeuf Floodway, as contemplated by the Jadwin Plan, was never constructed, and we have never yet actually been in a floodway as a result of the construction work done by the Government. The floodway was just a paper plan under the Act of Congress. I don't know whether the floodway would lessen the value of our lands or not. When they asked what I would take for my land under the so-called Jadwin Plan I told them I would take \$40 an acre for my land, and some of my neighbors thought I ought to have \$100. I told them I didn't think we would ever have the Jadwin Plan, and that I didn't want to bother them if they wanted to go ahead and put that plan through. I don't want to put myself up as a prophet, but I told them correctly. We would never have a spillway. I don't think the spillway has ever been in operative condition.

#### Defendant's Exhibit 37.

Mr. Isgrig: I want to introduce in the Record a copy of a Stipulation entered into between counsel in this case, filed in the United States Court of Claims, which exhibit infers that all of these suits are identical issues of liability, and that this is a test suit. It clearly shows the competency of all testimony in these floodways because exactly the same pleadings are filed in all of the suits. I want to file it and make



it a part of the Record to show the admissibility of this testimony.

Mr. Williamson: That would have no part in this case. It was purely a matter of procedure as to what suit should be tried first. We have no objection to stipulating that the Sponenbarger land has been selected as a test case to determine the liability of the United States to property owners in the Boeuf Floodway, and that all claims pending in the United States Court of Claims have been suspended temporarily pending the final decision in this case. That Stipulation has nothing to do with the particular issue in this case as to whether or not the Sponenbarger land, which is located squarely in the mouth of the Floodway, has been taken; and if so, the extent of the damage. That is the sole issue in this case. The Stipulation could not possibly throw any light in determining those simple issues in this case.

The Stipulation referred to is as follows:

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(Defendant's Exhibit 37.)

Motion to Suspend Action Temporarily.

(Filed August 20, 1934.)

In the  
Court of Claims of the United States.

Jefferson Investment Company, Petitioner,  
No. 42721. vs.  
The United States of America, Defendant.

And Other Cases Listed In Schedule "A" Hereto Attached.

Comes Lamar Williamson, as attorney of record for the petitioners in a number of cases listed in Schedule "A" hereto attached as a part of this motion, and come House, Moses and Holmes, as attorneys of record for the other petitioners listed in said Schedule "A" hereto attached, and respectfully move the court to suspend further action in each of the cases listed in Schedule "A" hereto attached, which cases have been recently filed in the Court of Claims, and to permit said cases to remain on the docket without further proceeding therein, until the identical issues of liability can be determined by the Supreme Court of the United States in the test case of J. Caroline Sponenbarger versus the United States of America which is now pending for trial in the United States District Court for the Eastern Division of the Eastern District of Arkansas, No. 892—at law.

The allegations of liability in said test suit pending in said United States District Court are identical to those alleged in the cases listed in Schedule "A" hereto attached. The record on the issue of liability will be identical to that which would be constructed in cases listed in Schedule "A"; and inasmuch as the said test suit pending in the United States District Court will reach the Supreme Court of the United States for final decision with all possible speed, it would be a useless and unnecessary expense to construct a duplicate record.

Most of the petitioners in the cases listed in Schedule "A" are not financially able to meet the expense of developing their cases, and they have been filed in most instances merely to stave the bar of the statute of limitation until a proper test case can be carried to the Supreme Court of the United States for final decision on the identical issue of liability.

Respectfully submitted,

LAMAR WILLIAMSON, and  
HOUSE, MOSES AND HOLMES,  
By W. H. Holmes,

A member of the firm.  
Attorneys for the Claimants.

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## Schedule "A"

## To Motion to Suspend Action

List of Cases filed by Lamar Williamson, as Attorney of Record, to which the attached Motion is applicable.

| Case No. | Name of Petitioner   | Amount of Claim |
|----------|--|-----------------|
| 42718    | Southeast Arkansas Levee District                          | \$3,000,000.00  |
| 42719    | Cypress Creek Drainage District                            | 2,500,000.00    |
| 42720    | Eudora-Western Drainage District                           | 2,520,000.00    |
| 42721    | Jefferson Investment Company                               | 25,000.00       |
| 42722    | Anna B. Hight and Farel Hight                              | 42,500.00       |
| 42723    | John Lynn Parker   | 142,640.00      |
| 42724    | Tom H. Free  | 82,000.00       |
| 42725    | Tillar Mercantile Company, T. R. H. Wolfe, Trustee, et al. | 434,575.50      |
| 42726    | Lewrench Wolfe   | 174,665.00      |
| 42727    | E. E. Hopson, Sr., as Guardian of Edwin E. Hopson, Jr.     | 132,480.00      |
| 42728    | W. Elmo Thompson and Edwin E. Hopson                       | 14,720.00       |
| 42729    | Thomas D. Newton, Noel D. Newton and James A. Newton       | 38,284.00       |
| 42730    | Bertie C. Prewitt  | 18,400.00       |

|       |  |            |
|-------|--|------------|
| 42731 | Edwin E. Hopson  | 65,500.00  |
| 42732 | Passumpsie Savings Bank  | 75,000.00  |
| 42733 | Jesse R. Prewitt and Taylor A. Prewitt   | 73,400.00  |
| 42734 | Guy H. Courtney and Emma E. Courtney, Ethel M. Courtney and Charles James Courtney | 120,100.00 |
| 42735 | C. Turner Neal   | 60,000.00  |
| 42736 | Vestal Lumber & Manufacturing Company  | 35,000.00  |
| 42737 | Fannie Stroud  | 39,565.00  |
| 42738 | Edward C. Hussleton  | 13,400.00  |
| 42739 | William M. Snow  | 17,600.00  |
| 42740 | William C. Reitzammer  | 21,600.00  |
| 42741 | Ed McCaughy and Hugh Lee Williams  | 31,000.00  |
| 42742 | Proctor Trust Company  | 39,219.20  |
| 42743 | Proctor Trust Company  | 10,938.80  |
| 42744 | Passumpsie Savings Bank  | 10,660.00  |
| 42745 | Abner McGehee, Scott McGehee and Wylie A. McGehee, Trustees                        | 93,206.00  |
| 42746 | R. H. Wolfe, Attorney in Fact of T. F. Tillar                                      | 75,200.00  |
| 42737 | Jesse McDonald and Florence D. White   | 183,160.00 |
| 42768 | Albert Carl Zellner, Roy M. Zellner, Mrs. Harry E. Zellner, et al                  | 188,240.00 |
| 42769 | James L. Flowers   | 17,640.00  |
| 42770 | F. D. Douglass Estate  | 28,370.00  |
| 42771 | Flöyd Matson, Adm'r of the Estate of W. D. Halley                                  | 45,000.00  |
| 42780 | Walter E. Taylor and Thomas E. Trimble, Jr.  | 31,000.00  |
| 42775 | R. J. Heckney Lumber Co.   | 70,236.00  |
| 42776 | Thompson-Katz Lumber Co.   | 81,540.00  |
| 42777 | Turner Lumber Co., et al.  | 244,498.00 |

List of Cases Filed by House Moses and Holmes, as Attorneys of Record, to which the attached Motion is applicable.

| Case No.  | Name of Petitioner                           | Amount of Claim |
|-----------|--|-----------------|
| 42754     | Sam J. Wilson                                | 311,000.00      |
| 264 42755 | Joe W. Pugh                                  | 156,859.00      |
| 42756     | John C. Wells                                | 125,370.00      |
| 42757     | Med Cashion                                  | 18,000.00       |
| 42758     | Moris Rosenzweig                             | 76,165.00       |
| 42759     | New Netherlands American Mortgage Bank, Ltd. | 467,460.00      |
| 42760     | (Petition Printed)                           |                 |
| 42761     | Ike H. Noyes, et al.                         | 64,400.00       |
| 42762     | Georgia Pembroke                             | 23,310.00       |
| 42763     | Pete Mulligan                                | 40,194.00       |
| 42764     | Sam Epstein                                  | 468,387.00      |
| 42765     | Victor B. Keiffer, et al.                    | 54,910.00       |
| 42766     | Jacob C. Gillison                            | 85,239.00       |
| 42773     | Macon Lake Plantation Company, et al.        | 283,452.00      |
| 42774     | Sorrells O. Savage                           | 64,170.00       |

265 HENRY MOORE, on behalf of defendant, testified:

I have been County Clerk of Chicot County since last August, and have lived in Chicot County since 1917, working as a bookkeeper. I have checked the records of the history of tax growth and forfeitures for taxes in Chicot County.

The following acreages for the years indicated were certified to the State for nonpayment of taxes, to-wit: for 1909, 109.86 acres; for 1910, 278.72 acres; for 1911, 356.78 acres; for 1912, 746.51 acres; for 1913, 307.58 acres; for 1914, 366.05 acres; for 1915, 451.70 acres; for 1916, 57.50 acres; for 1917, 1,411.07 acres; for 1918, 14 acres; for 1919, 487.45 acres; for 1920, 2,624.42 acres; for 1921, 3,406.01 acres; for 1922, 4,937.22 acres; for 1923, 21,835.71 acres; for 1924, 19,405.28 acres; for 1925, 8,614.15 acres; for 1926, 5,748.27 acres; for 1927, 40,305.48 acres; for 1928, 25,674.11 acres.

I do not think the passage of the Flood Control Act of 1928, affected real estate values in Chicot County. After 1921 there was a decrease in values. Then there was an improvement up to 1926. Thereafter there was a decided let down in values of all kinds. The low price of cotton together with the high cost of taxation destroyed the profit. The forfeitures of land back to the State steadily increased and affected the market value of other lands in the community. The 1927 flood temporarily affected values to some extent. The area in which I live in Chicot County is protected by the so-called fuse plug levee.

#### Cross-Examination.

I am not familiar with Desha County, nor the flowage rights there as covered by the Jadwin Plan. I do not know what proportion of the figures I have given from Chicot County are from areas within the confines of the Boeuf Floodway. I do not know how much of that acreage was immediately redeemed from the State of Arkansas. In Arkansas improvement districts are created by vote or petition of the majority of property owners of the territory affected. The purpose of the drainage districts was to take care of the water which had been flowing through the Mississippi River through Cypress Creek in order to close the gap in the levees at that point; and that burden was for the purpose of ultimately securing flood protection.

#### Redirect Examination.

The list of lands forfeited which I have given do not include large acreages which were forfeited to the improvement districts.



### Recross Examination.

If the floodway had ever been actually created by the construction work authorized by the Flood Control Act of May 15, 1928, that would be different as to the effect on market value of lands in that area between the gulle levees. My testimony is based on my understanding that the country to which I refer has never actually been in any floodway yet.

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G. A. McGEHEE, on behalf of defendant, testified:

I live at Lake Village and own 285 acres of land within the floodway of the proposed Jadwin Plan. I have lived in that community about 37 years. The passage of the Flood Control Act of May 15, 1928, providing for the fuse plug levee and the floodway, did not affect the market value of my land. The market value of my land took a drop about 1921 because of high taxes for drainage and levee purposes. This resulted in large forfeitures of land to the State and the improvement districts. Conditions in Chicot County are about the same as those in Desha County. The value of land follows the price of cotton in fluctuating. The cut-offs in the Mississippi River have lowered the height of water from 5 to 6 feet I imagine.

I recall the floods of 1912, 1913, 1916 and 1927. The 1927, was the biggest flood we ever had. It was not destructive or damaging to any great extent.

### Cross-Examination.

267 Lake Village, being on what was once the main channel of the Mississippi River, is higher than the territory west of Lake Village. The area between Lake Village and Montrose crossed by the Boeuf Floodway is low and swampy.

I understand that the Jadwin Plan is in effect, and that the Boeuf Floodway has been created as a physical fact. They left the levee on our side low and then raised the levee on the Mississippi side, and I think that we have been in the floodway ever since the Act was passed.

I had rather have land inside the floodway than outside because overflows deposit soil and makes the land better.

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A. E. DABNEY, on behalf of defendant, testified:

I live in Lake Village, Chicot County, Arkansas, where for 23 years I have been engaged in the mercantile, hardware and real estate business.

I owned two tracts of land in 1921 when the slump came which proved very expensive to us. Then these improvement district taxes came on and it put the real estate men out of commission. Some advance took place during 1925, and 1926, when cotton advanced. Real estate is governed principally by the price of cotton. Large acreage of cut-over land were forfeited to the State and could be purchased very cheaply, at a dollar an acre for the State's claim. That affected the market price of other lands in that community, which is in the Boeuf River Basin.

There were large tracts of cut-over land that went delinquent and could be bought from the State very cheap. The Jerome Hardwood Lumber Company let a whole township of cut-over land go delinquent.

I am not familiar with any particular farm land or place in Desha County, but have been to Arkansas City, and know that the character of land is practically the same as in Chicot County.

I don't think the passage of the Flood Control Act of 1928, reduced the market value of land in the Boeuf River Basin.

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## Cross-Examination.

In my opinion all of the lands in the alluvial valley of the Mississippi River in Southeast Arkansas, and the State of Mississippi, and in Louisiana, are equally subject to flood. The value of these lands went down when the timber was cut off of them.

I am not familiar with the lands in Desha County, nor with the plaintiff's land involved in this lawsuit. What I have said is intended to be applicable to the general character of lands in the Boeuf River Basin.

When the levee gap at Cypress Creek was closed giving levee protection in Southeast Arkansas, I did not pay taxes on cutover timber land not in cultivation. This is not applicable to cultivated land like the plaintiff's.

I have never studied the question of whether any of the construction work authorized by the Flood Control Act of May 15, 1928, had any effect on property in the Boeuf Floodway. I do not understand that the property has ever actually been in any existing potential floodway as designated by the Flood Control Act of May 15, 1928. There has never been any occasion to use the land laid out in that law, or the floodway proposed by that law. I do not think as a physical fact we have ever been in the floodway up to now. 75% of

the people in Chicot County did not believe the Jadwin Plan would ever be perfected. In my opinion, it never has been, and never will be. 75% of the lands in Chicot County west of Lake Village in this proposed Jadwin Plan were timber lands that at that time had no value. My testimony relative to how values have been affected by the floodway are based on the assumption that the floodway has never actually been put into operative condition.

It is well known that tax titles from the State of Arkansas are merely equitable, and people don't pay much attention to a tax title. A tax title isn't actually good until it is followed by actual possession for a period of limitation.

If this levee of the 1928 Act had been made, and it looked like a sure fact that this whole Boeuf Basin Floodway was going to be swept and flooded, then I wouldn't want land in that spillway. It might be as valuable but you have that hazard that is greater than one living under the protection of the levee. I don't think I said that the authorization of that hazard has had no effect on the values of land in that floodway. I said there was no market value in these lands at the time the Jadwin Plan was passed by Congress, referring to wild, cutover land. Placing a farm in actual cultivation in an actual floodway would affect the market value of that farm if it were a settled fact that the land was going to be placed in a floodway. It is my understanding that what is designated on the map as the Boeuf Floodway in Southeast Arkansas, is a condition that has never existed.

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F. C. HOLLAND, on behalf of defendant, testified:

I am 70 years old and have lived in Lake Village, Chicot County, Arkansas, about 19 years, moving there from Pine Bluff, Arkansas, where I lived about 12 years. I have been in the real estate business, and was selling land in Chicot County in 1912, 1913 and 1914.

The passage of the Flood Control Act of May 15, 1928, did not affect the market value of land in Desha and Chicot Counties so much with the local people as it did with non-residents who were looking for protection. Of course newspaper's stories of the 1927 flood had a whole lot to do with it. The thing that hurt the sales of land near that area of country was excessive taxes that existed generally over the country. I lost for taxes some land I owned at Tripp Junction in Desha County. These taxes began to accumulate for

improvement districts for levees, drainage, and roads,  
270 about 1915.

The fluctuation of the price of farm products is reflected in the fluctuation of the price of farm land.

The demand for these lands has been increasing for the last 5 years ever since the lands were forfeited to the State and people began taking them under the homestead law or buying them and selling. I presume there are about 1,000 new families in Chicot County that have taken up these lands from the State and built homes on them.

#### Cross-Examination.

These people who buy land from the State at \$1 an acre, or homestead it, commonly called "squatters," do not have any real substantial purchasing power. They clear the land up and put it in cultivation. In 1936, we had unusually large crops which, from past experience, we cannot hope to have repeated from year to year. Cotton sold to as high as 14c and brought a large amount of money into Chicot County in the Fall of 1936. I made more sales last year than I had in 3 or 4 years, and even then had to make the sales on easy terms and long payments. I am referring to Chicot County, and in the lower part of Desha County you will see that kind of population. They are all squatters and have taken up land. These people began coming in there by the hundreds in 1927 when we were flooded bad and the Red Cross was in there spending money. Chicot County has the record of having more people on relief than any other county.

Of the area of the Boeuf Floodway which is in Chicot County I would say about 15% is in cultivation and the remaining 85% is wild, swamp, cutover timber land. That timber land was not injured by the 1927 flood. The actual physical damage of the 1927 flood to that land in Chicot County was negligible. After the flood got off it was just as good as it had ever been.

I understand that the fuse plug of the Jadwin Plan, in  
271 front of the area I have referred to as the Boeuf Floodway, has not been completed, and the Boeuf Floodway has never been in an operative condition. It is my understanding that the plan has been modified by the Overton Act.

Land in a floodway would not have as much value as land of the same type and character outside of the floodway where it is protected. I would say that the Jadwin Plan did affect



the value of cultivated lands in Chicot County to the extent of 10% of their market value, but it was high taxes which destroyed all the market value.

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W. V. FARRELL, on behalf of the defendant, testified:

I am a city mail carrier, in McGehee, Desha County, Arkansas, where I have lived about 15 years. I bought 120 acres of land in the Boeuf Floodway about 1933, and have got most of it in cultivation since I bought it. I don't think the passage of the Flood Control Act of May 15, 1928, affected the market values of land in that area.

#### Cross-Examination.

I paid \$500 for the first 40 acres I bought about 10 miles northeast of McGehee. It was very fertile land, as fine as any in the country, as rich as the reputed Nile Valley, making a bale of cotton to the acre year in and year out. About 17 acres was in cultivation with one tenant shanty on it. I bought the adjoining 80 acres of land from the State for \$1 an acre, and paid the original owner \$1 an acre. I have paid all taxes and improvement district assessments.

I understand that my land is now in the actual, potential, operating floodway, which means that when the water reaches a fixed gauge at Arkansas City the fuse plug levee will blow out and overflow the land. If the Government exercises its right to overflow my land, I expect \$100 an acre for damage to my cultivated land and \$25 per acre for the woodland.

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#### Redirect Examination.

I new my land was in the floodway and might overflow some time when I bought it. I don't think I am damaged \$100 an acre now just because the flood will go over the land some time in the future. I know some land in that area was actually benefited by the flood of 1927, by the sediment that the water left on it.

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R. F. Cox, on behalf of defendant, testified:

I have lived in Dumas, Desha County, about 35 years, and own about 1,500 acres of land. It is not in the Boeuf Floodway, nor affected by the fuse plug levee. I am not familiar with the floodway area of the country and never go down there. I am not familiar with the value of land in the floodway. The proposed floodway does not come near Dumas. Generally speaking the price of cotton largely governs the price of land.

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G. L. STEWART, on behalf of defendant, testified:

I live in McGehee, Arkansas, and operate a timber business. I bought 240 acres in the floodway in 1932, since which time I have lived in Desha County. I have cleared and put in cultivation about 200 acres of the land and built 11 houses on it. I knew the land was in the floodway when I bought it for farming purposes. There has been an increase in the value of good farm lands in the area where my land is since 1930.

#### Cross-Examination.

I know nothing about the character or conditions of land in Desha County prior to the time I got there in 1930. The map shows that the land I bought is considerably north of the authorized Boeuf Floodway and would be protected under the Jadwin Plan. I don't know anything about that spillway. When I bought the land in 1930, I did not know that the guide levees would never be constructed. The map shows my land in an area that is designed to be protected  
273 by the Jadwin Plan.

In 1932, I bought 55 acres of this land in the woods from a woman in Mississippi for \$10 an acre. As to fertility and productivity there is no finer land anywhere. I bought 80 acres of the land from the State at \$2. Last year the land produced from a bale to a bale and a half of cotton per acre. If that land had flood protection I think it would be worth at least \$200 an acre.

I do not know of any land having absolute flood protection that will make one to two bales of cotton per acre. I do not regard land behind any kind of a levee as having absolute protection.

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C. W. MEADOR, on behalf of defendant, testified:

I live in Dumas, about 30 miles from Arkansas City, in Desha County, and do not own any land affected by the fuse plug levee, nor in the floodway. I own 1100 acres that was affected by the Pendleton break in the Arkansas River levee in 1927. I started buying this land in 1932.

I do not think the passage of the Flood Control Act of 1928 affected the market values of farm lands, referring to the territory around Dumas and in Desha County that was overflowed by the break of the Arkansas River at Pendleton.

## Cross-examination.

In all my land dealings I never heard the floodway mentioned in buying and selling land. I had rather have land inside the floodway because in the overflow conditions that I have known since I have been here for about 20 years they always leave a sediment on the land that makes it better. This very land that I bought was nothing but a Pin Oak flat until the flood went in there and left about 18 inches of silt on it, and now it is the best land in the country. In my opinion, therefore, having land in the floodway will tend to increase the market value and desirability of it.

274 None of the lands I own, which were overflowed by the 1927 flood, are in the Boeuf Floodway.

I am a druggist.

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W. F. RANA, on behalf of defendant, testified:

In 1930, I bought a little land near Watson in the overflow country and live on it. It is very fertile and desirable land, about 10 miles out from Dumas.

## Cross-examination.

The land is not in the Boeuf Floodway. The lands were overflowed from the Arkansas River in 1927, but are now protected by the 1928 grade and section levees which have been built on the south bank of the Arkansas River.

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J. C. GOULD, on behalf of defendant, testified:

I have lived at Rohwer, in Desha County, about 12 years and own 15 or 20 tracts of land aggregating about 2,000 acres which I have been buying for about 20 years and putting it in cultivation. This land would overflow from a break in the floodway. I do not think the passage of the Flood Control Act affected the market value of land in that county.

## Cross-examination.

I have been approached to be one of the appraisers for flowage rights in that area. About 200 acres of my land is in the Boeuf Floodway and the balance of the 2,000 acres is not in the floodway. My land was overflowed in 1927, from the Arkansas River. I bought my last 40 acres, 5 miles north-east of Rohwer, about 90 days ago for \$1 an acre. I bought 120 acres of very fine land about 5 months ago for \$500. My land cost me anywhere from \$1 per acre to \$10 per acre in the woods. I have developed the land myself. There

wasn't any value to land in 1928. I do not know when the plaintiff bought her land. If she paid \$100 for it in 275 1927, I think she paid the fair market value. I think the plaintiff's land could be sold after it was put in the floodway for \$100 an acre, but I will not offer that. I am not a land buyer. In my opinion plaintiff's land was worth \$75 to \$100 an acre in 1929.

My idea is that the Boeuf Floodway as designed by the Flood Control Act of May 15, 1928, has never become operative. I have never considered what would be the fair damage to land if the floodway ever becomes in a condition to actually function as a floodway because I never did think the original plan would go through. The engineers about 90 days ago were trying to prevent the levee from breaking at Yancopin on the Arkansas River. I did not know that under the present law it was the duty of the Army Engineers to prevent the levee from breaking at that point.

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WILLIAM KURTEN, on behalf of defendant, testified:

I have been associated in a legal capacity with the Army Engineering Corps at Vicksburg, since 1929, having been a practicing lawyer in Lake Village, Arkansas, prior to that time. I identify the statement referred to by the witness J. L. Parker, which I took, and which he signed in my presence after it had been taken down in Arkansas City by a stenographer, which I file as Exhibit 39.

Cross-examination.

It has been a part of my duty to gather testimony on behalf of the Government and I have spent a great deal of time doing that. I interviewed most of the witnesses who have testified for the Government. We took the statements of Mr. Cain, Mr. Rana, Mr. Meadow, Mr. Davis and Mr. Holland, who have testified, on a boat in the Mississippi River, in the presence of certain Government Engineers and attorneys. In securing these statements I have not told any of these witnesses that the Boeuf Floodway under the Jadwin Plan had been abandoned.

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Defendant's Exhibit No. 39.

Arkansas City, Arkansas

February 20, 1935

Statement of JUDGE J. L. PARKER, Arkansas City, Arkansas.

Q. What is your name?

A. J. L. Parker.



Q. How old are you, Judge Parker?

A. 51 years old.

Q. How long have you resided in Arkansas City?

A. Thirty years.

Q. Do you have planting interests in this vicinity?

A. I have, yes, sir.

Q. Are you the owner of what is known as De Soto Plantation about six miles above Arkansas City?

A. Yes, sir.

Q. How many acres are there in that tract?

A. Approximately six thousand acres.

Q. How much do you have in cultivation?

A. Around seven hundred.

Q. How long have you owned this, Judge?

A. I have owned it seven years, I guess.

Q. What time in 1928 did you buy?

A. I'm not positive. Either 1928 or 1929. The record is at home.

Q. But you bought either in 1928 or 1929?

A. Yes, sir.

Q. What is the character of the land?

A. It is black loam, buckshot loam.

Q. What effect did the 1927 flood have on the houses and improvements and the value of the land?

A. It washed everything away. Practically destroyed everything.

Q. What effect did the 1927 flood have on the saleable value of the lands?

277 A. We have had floods before and they did not do so much damage. But the 1927 flood was extraordinary. The levee had been built up, but there was this gap in here. The flood destroyed the value of the land.

Q. You know the Sponenbarger land described as Southwest Quarter of Southwest Quarter of Section 31 in Township 12 South, Range 1 West?

A. Yes, sir. I know that place.

Q. What effect did the flood of 1927 have on this place?

A. Destroyed the value of it. The flood and things after the flood destroyed the value.

Q. What would you consider the Sponenbarger land worth?

A. Now?

Q. Yes, sir.

A. I don't know, Mr. Kirten. It's just hard to determine. The soil is as good as it ever was. They paid \$100.00 an acre for it. Cash.

Q. It produces fine crops?

A. Yes, sir. No better land in Arkansas.

Q. Since the flood it produces good crops?

A. Yes, sir.

Q. Except in extreme drouth and the boll weevil?

A. Yes, sir. It produces good crops.

Q. Is your land the same character as Mrs. Spönenbarger?

A. Yes, sir, same character of soil. Two thousand acres of my land are red Arkansas River land.

Q. Would you consider that good land?

A. Fine as in Arkansas.

Q. Judge Parker, what did you consider the Spönenbarger land worth before the flood of 1927?

A. Worth \$100 an acre, choice piece of ground and nicely located.

Q. How much do you consider it depreciated after the flood?

A. Couldn't get over \$25.00 or \$30.00 an acre today. I don't think he could get that for it today. Several things enter into it, the economic situation for the past several  
278 years has been bad. The spillway hasn't caused all this depreciation.

J. L. PARKER.

279 FRED BAYLEY, on behalf of defendant, testified:

I live in Vicksburg, Mississippi, and have been employed by the United States Government Engineers since October, 1936, gathering data on land ownership, including assessments and bonded indebtedness and tax conditions in levee and drainage districts in the proposed floodway. I have prepared and filed a map giving such a taxation picture of the various areas composing Desha and Chicot Counties. In 1918 for Desha County aggregate taxes and assessments ranged from 14c per acre to \$1.37 per acre in the various areas. In 1925 the aggregate tax burden of the same areas ranged from 90c per acre to \$1.52 per acre. In 1926 the State of Arkansas assumed the road improvement district bonds which were secured by liens on the areas involved. In 1934 the aggregate tax burden on the respective areas averaged from 16c per acre to \$1.73 per acre, the 16c per acre land being of course on the river side of the levee. The plaintiff's land is in the classification of an average of from \$1.01 to \$1.06 per acre.

From 1933 to 1936 witness was employed by the Federal Land Bank of St. Louis, in making investigations of financial, economic and tax conditions in numerous counties in Alabama, Mississippi and Louisiana, under the supervision of the chief engineer and appraiser. Witness testified from

maps of Desha County showing the tax fluctuations from 1918 to 1922 and 1934. - The land in and around Arkansas City, which was assessed for state, county, school, highway, Southeast Arkansas Levee and Cypress Creek Drainage District averaged about 92c per acre for 1918. In Drainage District No. 4, which is the southeast portion of the county, the taxes averaged from 87 to 91c per acre. This was before the Improvement District taxes became such a burden on the land. In the northwest portion of the county the taxes averaged about \$1.37 per acre. This was caused by the overlapping of the Cypress Creek Drainage District and the Kirsch Lake Drainage District. The lands were paying both taxes. This map for the year 1918 was offered and received in evidence as Exhibit 40.

Improvement District Taxes on lands in this vicinity increased from 75 to 100% between 1918 and 1925. That portion of the land in the northeastern part of Desha County shown by the blue legend under Cypress Creek Drainage District was assessed with an average tax from 90c to \$1.08 per acre for the year 1925. The land south of there, in the southeast part of the county, which was in the Cypress Creek Drainage District and Southeast Arkansas Levee District and Arkansas-Louisiana Highway, averaged over \$1.35 to \$1.37 per acre, owing to the school districts that they were in. East of McGehee the average aggregate tax was about \$1.52 per acre. The map was offered and introduced in evidence as Exhibit 41 for the year 1925. In 1926 the Martineau Road Law relieved these lands of the payment of the Highway Improvement taxes. Another map was offered and received and made part of the record, marked as Exhibit 44, which showed the condition of Chicot County for the year 1925. At that time there were seven highway improvement districts and seven special drainage districts, and the various taxes assessed in the different areas depended upon the overlapping of these districts. The taxes averaged from 24c to \$2.15 per acre, the 20c land being on the river side of the levee.

Exhibit 45 shows as follows: "In the Middle Slough Drainage District, which is represented by the yellow legend in the southeast part of the county, the taxes average \$1.71 to \$1.84, while in Bayou Macon, which is in the extreme southern end of the county, represented by the black legend, the taxes average from \$2.05 to \$2.07 per acre."

Witness produced a tabulated statement from the records from Desha and Chicot Counties showing the mortgages

from which he testified and which was offered and received in evidence and marked Exhibit 47:

281 (Exhibit 47.)

"The records show the following mortgages, with the dates and amounts: 2

"J. R. Prewitt to St. Louis Joint Stock Land Bank, \$2500.00, November 26, 1935. The proposed guide levees would be run right through this land. These guide levees have never been built. Since there will be no guide levees these lands are in the so-called flood area.

"Leroy and Mary Odem and John and Molly Burns, to the Federal Land Bank of St. Louis, \$1800.00, July 21, 1936.

"Frank and Willie Bond, to the Southeast Arkansas Credit Corporation, \$1,000. These lands are entirely within the spillway.

"J. F. Wallace and wife to the Land Bank Commissioner, \$1700.00, October 1, 1934. This land is entirely within the floodway. It is entirely within the proposed guide line levees.

"Lawrence Wolf and wife to the Federal Land Bank, St. Louis, \$1500.00, May 25, 1934. The proposed guide line runs through this property, leaving 9/10ths of it inside of the proposed guide line.

"A. Z. Roberts and Annie C. Roberts, to American Life Insurance Company, \$2250.00, January 14, 1937. This land would be within the guide levees.

"C. C. Hawkins and wife to McGehee Bank, \$2,000, January 4, 1937. This land is entirely within the limits of the guide levee lines.

"W. H. Haberyam and wife to General American Life Insurance Company, \$750.00, January 15, 1936. This land would be between the guide lines.

"S. C. Riley and wife, to the Land Bank Commissioner, \$1300.00, March 1, 1936. This land is entirely within the proposed guide line limits.

"J. C. Scroggin, to the Federal Land Bank, \$550.00, December 17, 1931. This land is entirely within the proposed guide limits.

"Z. E. Webb and wife, Federal Land Bank, \$900.00, March 8, 1935. Entirely within the proposed guide levees.



"J. L. King and W. H. Matthews and wife, November 1, 1934, to the Land Bank Commissioner, \$15,000. This land is located on Macon Lake and is entirely within the proposed floodway and limits.

"I. L. Gilliam and wife, to the Land Bank Commissioner, \$1800.00, July 1, 1935. This land lies entirely outside the proposed guide levee limits.

"Tillie B. Fiebelman, to the Land Bank Commissioner, \$5,600.00, and another from H. Dovey Crabtree, to the Federal Land Bank of St. Louis, \$2,000, January 2, 1935.

282 "William T. Files, to the Federal Land Bank of St. Louis, \$3500.00, June 1, 1934. This land is within the proposed guide line levees.

"M. M. O'Neal and wife, to the Federal Land Bank of St. Louis, \$10,000, November 1, 1930. This land lies entirely within the proposed guide lines.

"Clinton Cockrell and wife, to the Federal Land Bank of St. Louis, \$2200.00, January 1, 1929. Proposed guide line levee passes through this property.

"Maggie Barns to Federal Land Bank, St. Louis, \$11,000. November 1, 1935.

"W. B. Deyampert and wife, to the Federal Land Bank, St. Louis, \$50,000, February 1, 1934. The proposed guide line levee passes through this property.

"E. H. Dunning and wife, to the Federal Land Bank, \$1700.00; April 1, 1934. This property lies entirely within the proposed guide line limits.

"The deed record shows a deed from J. B. Proctor and wife to E. A. Weir, consideration of \$12,600.00, and mortgage from John W. Ware and wife to the Federal Land Bank, \$5250.00, dated October 26, 1936. The proposed guide line levee passes through their property.

"Ben Epstein to Federal Land Bank, \$400.00, May 29, 1936. This property lies entirely within the proposed guide line limits.

"Helen Epstein to Federal Land Bank, consideration \$300.00; May 5, 1936. This property is entirely within the guide line levee.

"Mose and Estelle Dove, to Federal Land Bank, \$800.00, May 5, 1936. This property lies entirely within the proposed guide line limits.

"Helen Epstein to Federal Land Bank, \$700.00, October 31, 1934. This property lies entirely within the limits proposed for guide line levees.

"J. C. and Viola Davis to the Federal Land Bank, \$600.00, September 15, 1936. This land lies within the guide levee limits.

"W. L. Partain and wife to the Federal Land Bank, \$3700.00. July 28, 1936. This property lies entirely within the proposed guide limits.

"Hammond Ranch Corporation to Federal Land Bank, \$900.00, November 8, 1935. Land entirely within the proposed guide line limits.

"Bessie and John D. Abels to Federal Land Bank, \$450.00, November 8, 1935.

"S. P. Gore to Federal Land Bank, \$450.00, November 16, 1936.

283 "A. C. Roscher to Federal Land Bank, \$2600.00, November 4, 1933. Land entirely within proposed limits.

"Alfred Mays to Federal Land Bank, October 5, 1933. Also within the limits.

"W. L. Manning and wife to Federal Land Bank, \$300.00, February 1, 1935.

"H. Williams and Ella Moore to Federal Land Bank, \$1250.00, November 2, 1936. Lies within proposed guide limits."

This tabulation is filed as Exhibit 46 and 47, to which evidence the plaintiff at the time objected and saved her exceptions of record.

In Chicot County: In 1918 taxes ranged from 3c per acre to 60c per acre; in 1925 from 24c per acre to \$2.15 per acre; and in 1934 from 21c per acre to \$1.54 per acre.

I have also examined the mortgage records of Desha, Chicot and Ashley Counties and exhibit a map of the Boenl Floodway on which is indicated the location within the floodway of a number of tracts of land which the mortgage records show have been mortgaged since 1930 to The Federal Land Bank of St. Louis, Missouri, most of which mortgages are dated in 1935, 1936 and 1937.

#### Cross-Examination.

I have never lived in the State of Arkansas and have no personal familiarity with any of the conditions in Desha

County or Chicot County. My testimony is based purely on an examination of the records. I know nothing about the conditions, or difference in fertility, of either of the tracts of land referred to, nor have I any idea of the conditions which led up to the transactions about which I have testified. I have not examined the properties at all. I cannot testify as to the total acreages involved, nor what proportion thereof is in cultivation and what is in timber. Only two of the tracts referred to are located near the plaintiff's land, viz., the C. C. Hawkins mortgage to McGehee Bank and the J. C. Scroggins mortgage to The Federal Land Bank. I do not know whether or not Mr. Hawkins' financial condition justified the comparatively small loan of \$2,000.00 on his own financial statement alone. I also would not know if The Federal Land Bank had sold Mr. Scroggins that land and just took a mortgage back for the purchase price amounting to only \$555.00. Only ten of the transactions to which I have testified are in Desha County, and I do not know how many of them represent sales made by The Federal Land Bank in comparatively recent years for the purchase price of which they merely took mortgages back.

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BEN F. McWHORTER, on behalf of defendant, testified:

I am an employe of the Vicksburg United States Army Engineering District, and have prepared graphs showing the trend of cotton production in the floodway area. The graph referred to by witness was offered and received in evidence and marked as Exhibit 48. I have shown Chicot, Desha and Lincoln Counties in which the production has a steady increase all through the various counties up to 1926, with decided drop in 1927, back-up in 1929, another drop in 1931, and then a falling off after that date. The vertical scale is in 500-pound bale, the yearly production and the horizontal scale is in years and you can see there the years and apply the number of bales for the year on the vertical line and it becomes a graph showing the relation of one year with another on cotton production. For instance, in 1922, there is shown a little over 10,000 bales a year and you follow it through and Chicot County was a little over 10,000 in 1923, Desha area was a little over 15,000 in 1924 and 1925. You have a gradual rise there and the period of the graph is 1922 to 1934 going from the time that the proposed 1928 or rather the Jadwin Act was enacted and that time at which it became known. Witness also introduced a map showing the location of various counties which was offered and accepted in evidence as

Exhibit 49. The witness also introduced and testified  
 285 from graph 53, which was offered and received as  
 evidence and marked Exhibit 51, and graph 52 which  
 was offered and received in evidence and marked as Exhibit  
 52. Witness produced graph No. 19, from which he testified  
 and which was offered and accepted in evidence, and marked  
 Exhibit 54: This graph was prepared to show the trend in  
 the price per acre of farm lands over the entire United  
 States. It was prepared by the same procedure as to scale  
 as to the previous graph. However, the period has increased  
 from 1912 to 1935 and the vertical scale is in percentage. It  
 is based on estimating the values of 1912, 13 and 14 as 100  
 per cent. I have covered three different sections of the United  
 States as a whole being the blue line, the west central states  
 which included Arkansas, Louisiana, Oklahoma and Texas  
 and the east south central states. This data was taken from  
 the Agricultural Year Book of 1935, which is a Government  
 Publication and the data in this book was in productivity as  
 to states. It will be noted that the values remain pretty much  
 the same from 1912 to 1915 and then there is a sharp decline  
 o 1920, except the south central states. This increase was  
 almost uniformly lost, about 50% of it by 1922. The south  
 central states showed a partial recovery going up in 1925.  
 There is no large fluctuation between 1925 and 1930 but a  
 gradual decline, and then the depression from 1930 to 1937  
 is uniform throughout and the rise from 1933 to 1935. The  
 report of the census within the Boeuf Floodway of Arkansas  
 shows that in 1929 Desha County's population was 1,547. In  
 1936 it was 2,375, an increase of 828 people, or a percentage  
 of 36. I have also taken from the records of the Department  
 of Agriculture and Department of Commerce prices of cotton  
 as follows: for 1922, 22.8c; in 1923, 28.7c; in 1924, 22.9c; in  
 1925, 19.6c; in 1926, 12.5c; in 1927, 20.2c; in 1928, 18c; in 1929,  
 16.8c; in 1930, 9.5c; in 1931, 5.7c; in 1932, 6.5c; in 1933,  
 286 10.2c; in 1934, 12.4c.

The census reports of the floodway in Desha County  
 show a population of 1547 in 1929 and 2375 in 1936, an in-  
 crease of 828 people. In the floodway in Chicot County is  
 shown a population of 6812 in 1912 and 8833 in 1936, an in-  
 crease of 2021. Ashley County had a population of 2742 in  
 1929 and 3652 in 1936, or an increase of 910.

#### Cross-Examination.

The cotton production figures I have given cover all of each  
 of the counties named, and is not limited to the area within  
 the proposed Boeuf Floodway. I show the proportion of  
 each county within the proposed floodway from a geographic



standpoint but that does not show the proportion of acreage in cotton. My figures are based on ginning reports for the entire county, regardless of where the cotton came from.

My graph shows the first pronounced peak in the production of cotton to be in 1926, and the price of cotton in 1927 rose to 20c a pound. Whether high market values for real estate would follow a peak production in 1926 with high prices in 1927, I cannot say.

The peak of the depression was in 1930. The year before, 1929, represented a peak of production with the fairly high price of 16.8c per pound for cotton. In 1930, production declined and the price was 9.5c per pound for cotton, which decline continued throughout the depression. There has now been a gradual recovery of cotton prices up to this date.

The population figures which I gave for the floodway area are figures prepared in typewriting by the Army Engineers of the Vicksburg office for their own information. I don't know whether it is a public document or not. We actually took a census of the people in there. I saw a large number of donators on the State land with little shacks all over that country. I actually saw these folks going in there and squatting on the land and clearing it—these homesteaders of tax forfeited lands.

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GILKARD H. MATHES, on behalf of defendant, testified:

I am 63 years old and at present am principal engineer in the office of the President of the Mississippi River Commission at Vicksburg. I was born and reared in Holland and was educated at the Massachusetts Institute of Technology. I have made hydraulic engineering my life's work, and have had vast experience. My first experience in hydraulic work was for the Commonwealth of Massachusetts, in 1896 in the Boston Harbor. Also worked on the survey of the Connecticut River in connection with flood control. In 1897, was appointed as a member of the United States Geological Survey, which was concerned with the measurement of the flow in the rivers in the United States. Worked on this for five years. In 1897 was detailed to make a study of Potomac River and its principal tributary, the Shenandoah. Made personal field investigations and wrote reports. In 1898 was sent to southwestern Colorado to make an investigation and survey of the San Juan and Mancos Rivers for the benefit of the Indian Service, locating reservoirs. Made a report which was published in the annual report of the Geological Survey of that year. In 1899 was sent to Arizona to start survey of a por-

tion of the Gila River in connection with the determining of the possibility of storing flood waters there. In 1900 was sent to northern Montana, at the direction of Secretary Walcott of the Geological Survey. Also made a survey and report for reservoirs project for river reclamation on the Big Sioux River in South Dakota. In 1902, after the passage of the Reclamation Act of 1902, was detailed to start the first survey and studies for the Grand River Irrigation Project in Colorado. In 1903 was appointed to make reclamation surveys in Oklahoma on the southern tributary of the Arkansas and Red Rivers. In 1906 and 1907 was employed by the Reclamation Service on the construction of the Carlsbad Dam on the Pecos River in New Mexico. In the fall of 1907 accepted employment with the Colorado Power Company at Denver until 1911. During the depression in 1929 I found it advisable to return into the Government service and was assigned to work in Virginia, where I met Col. Harley B. Ferguson, who became President of the Mississippi River Commission in 1932. After he moved to Vicksburg in 1932 I came to his office as principal engineer. Since 1932 my work has been identified with the development of the Mississippi River in its channel stabilization program called for in the Flood Control Act of May, 1928. I am conversant with that Act and House Document No. 90 referred to in the Act.

Work was undertaken on the comprehensive project outlined in House Document No. 90 in a progressive manner as rapidly as locations for various portions of the work could be laid out, rights-of-way obtained and funds were made available. Studies were carried on continuously with the prosecution of the work to accomplish the objects of the Act to the best possible advantage. These studies showed that as a result of the stabilization work done the safe flood carrying capacity of the leveed channel of the river had been greatly increased. Several methods were employed concurrently. These consisted first of eliminating bends and loops in the river which had become menaces to the levee and which required constant revetment for the protection of the levee by making cut-offs, thereby shortening the river. The first cut-off below Arkansas City is called Ashbrook cut-off which was opened November 19, 1935. The next one below is Tarpley cut-off opened April 21, 1935. Both of these cut-offs were constructed and opened after the plaintiff's suit was filed in August, 1934. The next cut-off below is Leland cut-off opened July 8, 1933. The next one below is Worthington cut-off opened December 25, 1933. The next one below is Sarah cut-off opened March 23, 1936. The next one is Willow cut-off opened April 8, 1934. The next one is Marshall cut-off

opened January 8, 1933. Skipping Yucatan, which the river made, the next artificial cut-off is Rodney cut-off opened February 29, 1936. The next one below is Giles cut-off opened May 25, 1933. The next one downstream is Glasscock cut-off opened March 26, 1933.

Witness was handed a map showing the alluvial valley of the Mississippi River from Helena below Natchez, which was published by the Mississippi River Commission, under the direction of the Secretary of War, which map the witness identified and which was offered and accepted in evidence and was marked Exhibit 55. This map had been revised to show the principal cut-offs which have been made in the river channel.

Mr. Williamson: "May it please the Court, plaintiff objects to any testimony by this witness as to the creating of cut-offs as the witness has defined them below the mouth of the Arkansas River or as to the effects of such cut-offs, because the cut-offs were not contemplated by the Flood Control Act of May 15, 1928. On the contrary, by House Document No. 90, of which the Court will take judicial notice, cut-offs were expressly condemned. Most of the cut-offs, and those in the proximity of Arkansas City which would affect the plaintiff's property, were made after the filing of the present lawsuit. Plaintiff's property, if taken at all by the United States, according to the plaintiff's contention, was taken January 10, 1929, or thereabout. The plaintiff was entitled to compensation under the provisions of the Fifth

Amendment of the Constitution of the United States  
290 for the taking of her property at the time it was taken, and under the conditions which existed and were contemplated at the time of the taking. This suit should be tried just as though it were being tried immediately after the taking of plaintiff's property. We further submit to the Court that having once taken the plaintiff's property, no later change in the plans by the defendant, nor even the abandonment of those plans, could affect the right of the plaintiff to recover, nor the measure of her compensation. That was settled by one of the decisions where the United States filed a condemnation suit and then undertook to abandon the condemnation. It was held that the plaintiff was not interested in whether or not the United States ever used the easements which were actually taken as a result of the construction done under the Flood Control Act of May 15, 1928. Had changes been made that greatly intensified the damage to the plaintiff, that would be a matter of which she could not take the advantage. The rule works both ways. The

Government had the perfect right to use the floodway had circumstances made it necessary, and whether or not the Government exercised that right is immaterial. The amount of physical damage or destruction that might have resulted to plaintiff's property is wholly immaterial, because it would have been the result of a right for which plaintiff had been compensated by the Government at the time of the taking. This right to flow the land is an easement which we call in this case the "flowage rights". No changes made after the original taking could be competent, relevant or material, because the plaintiff was entitled to her compensation, if at all, immediately following the taking. The measure of damages is the difference between the market value of plaintiff's land immediately before the taking as compared with the market value immediately after the taking, and nothing 291 that occurred years later, not in the contemplation of either of the parties at the time of the taking, could possibly affect the market value of the lands immediately after the taking when those changed plans had never been dreamed of. These cut-offs were not in the contemplation of the parties when plaintiff's property was taken on approximately January 10, 1929. So we submit, may it please the Court, that these after thoughts by the United States in the nature of cut-offs, to which the attention of the witness is now being called, are incompetent, irrelevant and immaterial; and can throw no light upon the legal measure of damages which is measured by the difference in the market value of plaintiff's land immediately before and after the taking, which was approximately January 10, 1929. For these reasons the plaintiff objects."

Mr. Davis: "I would like to voice this additional objection. The introduction of any evidence of this kind cannot be defensive in this action in view of the pleadings in this case. The petition charges that there was a taking at a certain time caused by the adoption of the Act and the beginning of work on it. It has been ruled several times that there was a taking when those things were done. In several cases filed in the Court of Claims the decisions on the demurrers were to that effect. In the Kincaid case, the Court held that a cause of action was stated at law for damages, and not one for injunction. In this Court the late Judge Martineau, in passing upon a demurrer, said that the petition in this case stated a cause of action. The answer in this case denies the facts alleged in the petition. It is not pleaded as a defense that the Government has done anything, or developed any plan, that would reduce the damages, or that would do away



with the damages. Rightly the answer pleads no such thing as that, because it would not be admissible in the answer to plead that there has been a reduction in the damages, or that the damages have been done away with by some other plan that the Government has adopted."

Mr. Isgrig: "Now, it is our contention that the plan itself provides for channel stabilization. Now then, they filed a suit here saying that certain things will result because of carrying out of the program under the Flood Control Plan. And they say that their land was taken by the passage of the Act because certain things will happen. \* \* \* Now then, we say considering all of the things we have done under that plan and the things left undone, the result will not be what they say it will be."

The Court overruled the objection, and plaintiff saved her exceptions of record as to all evidence which might be introduced, from time to time, as to the making of cut-offs and the effect thereof.

Witness was shown and identified a map showing the stretch of the Mississippi River between the mouth of the Arkansas River and Old River where the Red River meets the Mississippi. This map was offered and accepted in evidence as Exhibit 57.

In addition to making these cut-offs, a certain amount of dredging was done in the reaches of the river between the cut-offs, and additional work in improving the channel as by closing auxiliary channels around islands and contracting the river wherever necessary by means of sand dikes, all as a part of the comprehensive plan of channel stabilization involving the entire reach of the river under discussion. The 11 artificial cut-offs mentioned, with the natural cut off at Yucatan Bend made by the river in the Fall of 1929, shortened the river a total of 100.6 miles in the total distance of 372 miles between the mouth of the Arkansas River and the mouth of Old River. One additional cut-off is now being opened at Caulk's Neck above Arkansas City.

Corrective dredging is a distinctly different operation from navigation dredging. It is aimed at enabling the river to scour its channel at points where it needs assistance. When a cut-off is made the water surface above the cut-off is materially lowered, especially at high water and this lowering extends upstream. At places where there are bars which resist scouring it is necessary to use dredges

and when resisting substances like clay and gravel have been ruptured or cut through, then the river is enabled to lower its bed at those points. That species of dredging has been (—) very important feature of the entire channel stabilization program. The cut-offs should be looked upon as the initial steps only. The dredging is necessary in order to complete the work, in order to enable the river to complete the work of lowering its channel. As a result of this work done to date a very material lowering of the water surface of the river has been accomplished.

We open a cut-off by dredging a narrow cut known as a pilot cut. The river flowing through the cut-off widens it and eventually makes it a new stretch of the river. That takes time. In stretches of the river between these various cut-offs dredging operations were undertaken known as corrective dredging. The cut-offs should be looked upon as initial steps only. The dredging is necessary in order to complete the work. When a cut-off is made the water surface above the cut-off is materially lowered, especially at high water. This lowering extends upstream depending upon the readiness with which the river scours its bed. As a result of the work done to date a very material lowering of the water surface of the river has been accomplished throughout the entire 372 miles so that today the river has an appreciably larger flood carrying capacity between levees. The greatest lowering of the surface of the river has been accomplished in the latitude of the fuse plug levee.

The dredging operations were aimed to make this lowering consistent and as nearly as possible uniform throughout and it has resulted in producing that very thing. As a result, today the river has an appreciably larger flood-carrying capacity between levees. Also the water surface at high water and also at other stages is now lower with respect to sea level than it formerly was. And to be specific with regard to the localities that this case is interested in, namely in the latitude of Arkansas City and the fuse plug, the lowering of the water surface of the river that has been accomplished has been the greatest in that particular locality. That statement is based on careful studies which I have made personally. It is my business to make with the aid of observations made on the river which are available in the official files of the Mississippi River Commission, which consists of the readings taken on gauges and other measurements on the river made before the cut-offs were commenced and since they were made.

Additional high water gauges were established, especially in the vicinity of the cut-offs in order to know the behavior of the river while undergoing improvement. \* \* \* The flow of the water was measured at points where this class of work has been done for many years, principally in the vicinity of Arkansas City.

By making these measurements of the discharge of the river it is determined for a given stage and by collecting figures of this kind comparisons can be made showing how the relation between stage and flow is changed. For instance, at Arkansas City the flow has been greatly increased for a given stage and over and above what it used to be before the Act was passed.

The lowering of the stage at Angola, Louisiana and Arkansas City are now the same, because the program of channel stabilization is still in process of being carried on and much still remains to be done.

Witness exhibited a hydrographic showing the different floods from 1900 up to the present time, which hydrographic was offered and accepted in evidence as Exhibit 58.

The improved channel capacity effected by the means described by the witness would effect all floods and create an additional carrying capacity. The greatest channel improvement has been made between Arkansas City and the fuse plug. The lands in that vicinity have received protection 295 tions which is materially greater than it formerly was.

The floods which formerly were great enough to have gone over the fuse plug and overtopped it are now lowered to such an extent that they would not spill any water over the fuse plug.

The flood of February and March, 1937, would have exceeded the fuse plug levee if it had occurred ten years ago. It would have overtopped the fuse plug levee as it existed in 1928. This is a very definite thing, as shown by the observations made.

Every flood has its own characteristics. It would be 296 futile to try to classify floods by any recognized grouping or type. There are no types of flood. No two floods are alike, and there are no two year's records alike. The improved channel capacity described has given greater protection than formerly to lands behind the fuse plug levee, because floods that have previously overtopped this levee would not do so now. The 1937 flood would have overtopped the fuse plug levee if this channel stabilization work had not been done.

Since the improvement became apparent as the result of the cut-offs and channel work mentioned, recommendations were submitted to Congress which in 1936, resulted in the passage of the Overton Act which authorized the construction of the Eudora Floodway in lieu of the Boeuf Floodway. From the location of the plaintiff's property on the map I am of the opinion that it enjoys greater protection today from the destructive flood waters of the Mississippi River than it did at the time of the passage of the Flood Control Act of May 15, 1928.

### Cross-Examination.

Section 131 of House Document 90 defines channel stabilization as being a bank-protection scheme which "will consist of revetting banks by proven methods and in addition to trying new and cheaper methods to accomplish the same result." "The same result" is holding the channel of the river stable. In my opinion the cut-offs were authorized by House Document No. 90 by the above statement in Section 131, and by Section 147 which recites: "the project to include the floodways, spillways, levees, channel stabilization, mapping, etc., hereinbefore recommended, with such modifications thereof as in the discretion of the Secretary of War and Chief of Engineers may be advisable." That would leave the door wide open to adopt any method such as cut-offs, or any other additional methods that might seem advisable. I do not believe it is necessary to find any other provision in House Document No. 90 to fall within the meaning of the

297 words just quoted as "hereinabove recommended." It is true that instead of stabilizing the channel of the river as we found it when the Flood Control Act of May 15, 1928, was passed we have actually shortened the river approximately 100 miles, throwing away 100 miles of very undesirable channel. There is no statement in House Document 90 that I know of authorizing that effect. The official maps of the Jadwin Plan as made by the Army Engineers interpreting the Flood Control Act of May 15, 1928, do not indicate that any of those loops in the river were intended to be cut. Those maps were made previous to 1932.

Immediately following the passage of the Flood Control Act of 1928, work was begun on the Jadwin Plan as one, unified, comprehensive project for the flood control of the alluvial valley of the Mississippi River, funds being available at the time; and the work has proceeded practically without cessation since that time.



I see nothing unusual in the fact that there have been three successive floods in the years 1934, 1935 and 1936, which would indicate that floods are increasing in the Mississippi River in their frequency and intensity. I do not know of any streams in the United States where floods have been increasing. The studies show [tha] floods are not increasing either in frequency or intensity. I am not in agreement with the statement that the 1937 flood out of the Ohio Valley was the largest flood in the recorded history of that valley. The 1936 flood exceeded all gauges predicted by the Mississippi River Commission and the Army Engineers so far as the measured height of water was concerned.

In my opinion, if there had been a synchronization or a conjunction of the flood crest out of the Arkansas and White Rivers like there was in 1927, with the crest of the Ohio flood in 1937, I think they could have been carried safely by the fuse plug levee. The facilities which the Corps of Engineers now have for flood fighting are such that that would not have been an impossible undertaking. I do not  
 298 mean that the fuse plug levee can probably be made to safely carry a flood of approximately 3,000,000 cubic second-feet of water. In 1927, approximately 1,200,000 cubic feet per second was the flow which the Arkansas and White Rivers brought down. Approximately 2,000,000 cubic second-feet of water came out of the Ohio River to the mouth of the White and Arkansas Rivers in 1937. The amount of water which the fuse plug levee can probably be made to safely carry is appreciably less than 3,000,000 cubic second-feet of water. The back-water reservoir area at the mouth of White and Arkansas Rivers is probably larger than 1,200 square miles. That reservoir area was completely full of water in 1927, at the crest of the flood. In 1937 the basins of the Arkansas River and White River were both very low. If this back-water emergency reservoir at the mouth of the White and Arkansas Rivers is very low when a flood comes down from the upper Mississippi River, it acts as a reservoir and absorbs a large part of the water of the flood flow, and holds it in storage until after the crest of the flood has passed, and then it drains out slowly. It is a very important factor of safety when a flood comes down the levee to have that storage empty.

I understand that the project flood contemplated a flow of 1,950,000 cubic second-feet below Arkansas City for which the levee grades were computed. Over 2,000,000 second-feet actually passed in 1937.

"Q. Then, in your opinion, under present conditions and designs, it is not necessary to have a fuse plug in the levee along the Mississippi River; and all the levees along the Mississippi River above and below could be the same height as the fuse plug; is that right?

"A. You have no right to make that change until Congress so authorizes."

"I do not say that the fuse plug levee is no longer necessary. According to the Act it is supposed to serve as an outlet for excess flood waters which the leveed channel could not carry, but so far in our discussion we have not got to a flood big enough that the levee cannot carry. I cannot see why such frantic preparations were made in 1937, by the United States Army, to evacuate the country below the mouth of the Arkansas River when there was not much water in the Arkansas and White Rivers and just one little flood coming out of the Ohio. I cannot answer why they got so excited about it.

If the fuse plug levee is left as it is, a potential floodway is still there with a possibility of its use every season under the present plan; but I should say its use is highly improbable. Its function is to be used any time sufficient flood water comes down the river.

The Flood Control Act of June 15, 1936, the Overton Act, authorizing the Markham Plan, leaves this fuse plug levee along the main channel of the river at the 1914 grade just as it is under the Jadwin Plan of the 1928 Act. It is not to be raised. The fuse plug is to be strengthened. The cross section is to be made stronger. The Act specifically calls for that. That is in order that it will not overtop before it reaches the designated stage of 60.5 feet. When the water reaches a stage of 60.5, the fuse plug levee is intended to be overtopped and to crevasse under either plan. The plaintiff's land is in the floodway under either plan, and it doesn't make any difference which is used, and would be by the same fuse plug levee.

Section 69 of Document 90 recites:

"Artificial or natural cut-offs shorten the reach where they occur and by increasing the slope and velocity produce a local lowering of the flood stage. However, the increased velocities immediately cause excessive bank caving either in the reach or near it, and the river eventually lengthens itself with new bends. The changes in the channel cause great damage and expense. The bank revetment now in use, expensive as it is, has not been subjected to and withstood such

velocities as would be caused by cut-offs. Low-water navigation in any stretch is likely to be temporarily destroyed by bars created by the excessive bank caving caused by a cut-off. The method is too uncertain and threatening to warrant adoption."

That was a statement made in 1928, before it was understood that this work could be done by the methods now in use. At the time this statement was made it was probably a true statement in the light of the knowledge of those 300 days. These cut-offs of which I have testified were not contemplated when the Flood Control Act of May 15, 1928, was passed. For approximately 50 years the policy of the Mississippi River Commission was as recited in Section 64 of Document 90. For about 50 years, instead of making cut-offs, the Mississippi River Commission built dikes in these loops in the river to prevent natural cut-offs because they thought they were dangerous. That policy was changed by the Army Engineers some time after February 28, 1931, when the Chief of Engineers transmitted to Congress a report, found in House Document No. 798, that a program of cut-offs does not appear feasible.

The Jadwin Plan as adopted by the Flood Control Act of 1928, has not yet been actually, physically changed. There has been no appropriation for the mere authorization of the Overton Bill. The plan of the Overton Bill (Markham Plan of the Act of June 15, 1936), cannot, by its own terms, become effective until flowage rights have been acquired within a definite limit and that has not yet been done. The only plan under actual construction is that authorized by the Flood Control Act of May 15, 1928. That is the actual, physical plan which is on the ground.

Section 118 of Document 90, adopted by the 1928 Act, provides:

"To insure that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz. 3 feet below the new levee grade."

"This plan as described in Sections 117 and 118 of Document 90 has not been changed, but is still the plan at the present time.

Section 120 of Document 90 provides:

"The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height."

The escape of flood waters through the Boeuf Basin is, and for a number of years has been, an essential feature of this Jadwin Plan which is in operation.

301 Section 71, Document 90, recites:

"It is advisable to adhere to the present policy of preserving the river generally in its present form and not to undertake a plan of flood control or of improvement for navigation that involves the formation of cut-offs."

The Army Engineers departed from that declared policy adopted by the 1928 Act some time after 1931.

The Chief Engineer's official report, dated February 28, 1931 (House Document No. 798, p. 6), states:

"Preliminary calculations indicate but little encouragement for flood control through rectification and enlargement in the reach between the Arkansas and the Red, the most inviting reach of the river for such operations. The apparent reduction in flood heights is small, and the cost of the operations for flood control results appears prohibitive."

I am not in a position to speak of that policy. The action of the Corps of Engineers and the Mississippi River Commission was in conformity with that policy until after 1931.

The report of the Chief of Engineers to the House of Representatives, dated February 12, 1935, Committee Document No. 1, on which the Overton Bill was based, filed many months after the present suit was filed, in Section 10, states:

"The course of the Mississippi River in the middle section is generally tortuous, especially through the Greenville Bends, a series of wide loops below the mouth of the Arkansas. With a view to increasing its flood discharge capacity, experimental work on a large scale has been undertaken in the rectification of the channel by cut-offs. This rectification through the Greenville Bends, by the forces of Nature or by design, may so lower the local flood heights that the fuse plug levees at the head of the Boeuf Floodway will carry more than the safe capacity of the river below them."

That statement may have been true at the time it was printed in 1935; but since that time the leveed channel of the Mississippi River below the fuse plug has gained very materially in discharge capacity. The gauge at Natchez in the 1937 flood was more than a foot higher than it has ever been before, but it also discharged more water with the cut-offs in operation.



The report of the Chief of Engineers dated February 12, 1935, paragraph 25, states:

302 "The Commission points out that the rectification of the Greenville Bends, which may be safely undertaken after the Eudora Floodway is completed, and the draw-down of that floodway, together with the gradual construction of reservoirs on Mississippi River tributaries, will substantially reduce flood heights in the section between the Arkansas and the Eudora Floodway."

I am inclined to agree with that conclusion.

As stated by General Markham, the Chief of Engineers, to the Congressional Committee in April, 1935, in my opinion as an engineer these cut-offs will not eliminate the necessity of the Eudora Floodway.

General Ferguson, President of the Mississippi River Commission, correctly stated in his testimony to the Congressional Committee in April, 1935:

"We have never claimed that they (the cut-offs), would do anything to floods at all."

The cut-offs were primarily a part of the river stabilization for the benefit of navigation.

Colonel Oliver, the District Engineer, correctly testified before the Congressional Committee in April, 1935, when considering the Overton Bill:

"And the people within the floodway itself are subject to flood right now, and they are not going to have their flood menace actually increased by the plan which we propose."

Chief of Engineers, General Markham, as late as January, 1936, many months after the plaintiff's suit was filed, after most of the cut-offs to which I have testified had been made, testifying before a Congressional Committee, stated:

"As to the contention of those who think that the lower valley can be protected within the levees of the main stem, I would state our conclusion that in order to take care of flood water there must be taken out of the river a million cubic feet per second."

At the time General Markham made that statement it was correct. The cut-offs, which were then mostly in existence have enlarged materially and lowered the river considerably since the day that statement was made.

I do not dispute the correctness of the statement of General Markham made last month, April 3, 1937, before the  
 303 Rivers and Harbors Committee in Washington, after all of the cut-offs were working, and after the 1937 flood, that still it is necessary to take one million cubic second-feet of water out of the Mississippi River to the west below the mouth of the Arkansas River. Nor with the statement of General Markham in January, 1936:

"I repeat that a million second-feet must be taken out of that river unless you are going to have more and more disaster. I repeat that if we are to get this river under control it is by this class of control, by building the levees, by the plan of taking out this water by means of spillways."

That is the general plan of flood control for the lower Mississippi Valley to keep the water at times of flood below a safe height on the levees, and to spill out the excess waters. The general location of plaintiff's property is now in one of these particular floodways, at the most critical point of the river just below the mouth of the Arkansas. Just how the water would flow down the floodway is another question which I am not prepared to answer. The plaintiff's property has been on the floor of that floodway, very near its head, since the passage of the Flood Control Act of May 15, 1928. The levees on the south bank of the Arkansas River have been made very, very substantial, and I do not anticipate any further flooding of plaintiff's property from a break in the Arkansas River levees.

I absolutely agree with the statement of General Markham in January, 1936, to the Congressional Committee that the cut-offs in the bends of the Mississippi River are not meant to be a substitute for the Eudora Floodway.

In January, 1936, General Ferguson, President of the Mississippi River Commission, stated to a Congressional Committee:

"Our figures now indicate that a flood such as occurred in 1927, would have to have water diverted somewhere below the mouth of the Arkansas River. At the present time no man can definitely foresee any avoidance of diverting waters below the mouth of the Arkansas."

Cut-offs are not safe as a substitute for a floodway such as the proposed Eudora Floodway. At the time these  
 304 statements were made in January, 1936, they were correct. While the channel of the river has been shortened about 100 miles between the mouth of the Arkansas River and the mouth of the Red River, the geographical distance

between those points—the flood channel, from the top of the levee on one side to the top of the levee on the other side—has of course not been shortened at all. The levee lines are the same.

Between the years 1776 and 1884, there were approximately 19 natural cut-offs in the alluvial valley of the Mississippi River which shortened the channel a distance of 228 miles, but in 1929, the river had regained its normal length to within 2.6 miles of its original length in 1776. It is a hydraulic law of rivers in alluvial valleys that they will maintain their length if left to function alone.

The cut-offs are planned to take advantage of this hydraulic law. Corrective dredging will maintain the channel.

The natural flood plane of the Mississippi River in the middle section is indicated by the green coloring on the official map introduced in evidence. The construction work done by the United States Government under the Flood Control Act of May 15, 1928, now prevents the Mississippi River from using that large natural flood plane area east of the river in the State of Mississippi.

In my testimony I have only given my own opinion, and have not spoken authoritatively for the Chief of Engineers, U. S. A., nor for the Mississippi River Commission.

#### Redirect Examination.

In my opinion the improved channel capacities to which I have testified will be maintained as long as the Corps of Engineers is on the job. Maintenance is necessary.

205 COLONEL LUNSFORD E. OLIVER, on behalf of defendant testified:

I have lived in Vicksburg, Mississippi, for approximately five years, and have been District Engineer of the United States Corps of Engineers since 1933. I graduated from the United States Military Academy in 1913, and have had various assignments of duty.

The levee on the South bank of the Arkansas River from Pine Bluff to Yancopin has been raised to the 1928 grade and section. From Yancopin down to Rohwer, a distance of about 19 miles, the levee has been left at the 1914 grade and section. From Rohwer down to Luna Landing, 32 miles, is the stretch of levee designated as a fuse plug levee under the Jadwin Plan, which is likewise at the 1914 grade and section. Immediately North of Arkansas City for about 8 miles up to

Lucca Landing, a set-back levee has now been likewise constructed to the 1914 grade and section. From Luna Landing at the lower end of the fuse plug levee as designated in the Jadwin Plan, to Vacluse, about 9 miles, the levee is likewise at the 1914 grade and section. From Vacluse to the Louisiana State line the levee has been raised to the 1928 grade and section. Nothing has been done with reference to the construction of the proposed guide line levees in the Boeuf Floodway under the Jadwin Plan.

It is very readily seen or verified that Congress did not enact into law by any means all of the recommendations of General Jadwin. General Jadwin recommended that the United States should not begin work on this project until the state had assumed the liability to pay the local people whatever might be necessary to acquire their right to raise the levee and protect themselves. But the Congress did not enact the recommendations of his into law. General Jadwin wanted us to obtain control of the fuse plug levee but congress did not do anything about the acquiring by us of control of the fuse plug levee. It has always, that has always been the understanding of the War Department.

306 Quoting from Committee Document No. 2, 71st Congress, first session, James R. Good then Secretary of War, wrote to the Attorney General: "It is realized that the flood control project has a weak spot with reference to flood control in that there is no law preventing local interests from raising the so-called fuse plug levee at the heads of the Atchafalaya and Boeuf basins. These interests have not been deprived by the United States of protecting themselves and they can do so insofar as the United States has any jurisdiction. However, it is felt that the states so greatly benefitted by the flood control project and so dependent for protection upon its scheme of water control, can if they so desire, make laws prohibiting the raising of the fuse plug levees and can settle with the land owners for any rights taken from them."

If the local interests desire to go upon what is commonly called the fuse plug levee and raise it to an elevation of six feet, eight feet or any other height, is there any power or will the engineering forces claim any power, right or authority to prevent them from doing this very thing. There is nothing can prevent them from doing so.

It has always been the understanding of the War Department that we have no right under the Jadwin Plan to prohibit the local people from raising the fuse plug levee if they so desire.



When the last high water of 1937 was impending, under instructions we made preparations for raising and strengthening those sections of the levee which were low, with instructions not to permit any levee in the District to be overtopped or breached if we could prevent it. We would have carried on this fight beyond the 1914 grade, and would have welcomed help from the local people.

It was quite noticeable that the people on the Mississippi side of the river were worse scared during the 1937 flood than were people on the Arkansas and Louisiana sides.

#### Cross-Examination.

I have seen local interests at work on that fuse plug levee a few miles North of Arkansas City, but cannot tell whether it had sunk below the existing grade as prescribed by the Flood Control Act of May 15, 1928. I wouldn't say that local interests have ever raised the fuse plug levee anywhere above the 1914 grade and section. The fuse plug levee has been left at, and still is at, the 1914 grade and section.

When the 1937 flood was coming I told the people in Arkansas and Louisiana that there was no danger whatsoever South of the Arkansas River because of the emptiness of the reservoir area back up the Arkansas and White Rivers. Therefore, the 1937 flood did not endanger the fuse-plug levee at all.

#### Redirect Examination.

By 1914 grade and section is meant that prior to the 1927 flood the Mississippi River Commission had established levee grades up and down the Mississippi River to which they proposed to build all the levees eventually. The levees had partially been built to that grade when the 1927 flood came. That grade was called the 1914 grade and section. In the 1928 Act authority was given for raising the levees to a new grade and to a greater cross section, and the levee grades and cross sections established under authority of the 1928 Act are referred to as the 1928 grade and section established by the Mississippi River Commission.

308. GEORGE A. MORRIS, on behalf of defendant, testified:

I have been employed as an engineer in the United States Department of Engineering at Vicksburg since 1929, having received a degree in engineering at the University of Alabama in 1928. In 1935 I supervised the work of the Discharge Section which has to do with the measurement of the flow of the Mississippi River. Since 1926 I have had respon-

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sibility for field and office investigations in the hydrographic surveying of the river to determine the flood flow characteristics.

I exhibit a profile of the fuse plug levee which shows the flow lines of the Mississippi River during the 1927 and 1929 and 1937 floods for comparative purposes. Witness exhibited a profile which officially recorded the water surface elevation and other information along the Mississippi River, which was offered and accepted in evidence as Exhibit 59. When the 1937 flood reached its crest, the fuse plug levee still had 4 feet of free board above water at its lowest point. In the vicinity of Yancopin 5 feet of levee were above water. The profile indicates that the fuse plug levee would first have been overtopped below Luna Landing, about 25 miles below Arkansas City. Witness produced a graph showing the relationship between stage and river discharge for the period of 1929, which was offered and accepted in evidence as Exhibit 60.

We have carefully plotted the water discharges of the Mississippi River along the fuse plug levee during the high waters of 1929, 1933, 1935 and 1937. The crest discharge in 1937 was 2,150,000 cubic feet per second. In 1935 it was 1,440,000 cubic feet per second. In 1933 it was 1,338,000 cubic feet per second. In 1929 it was 1,788,000 cubic feet per second. In 1929 the stage of the river on the Arkansas City gage at the crest of the discharge of 1,788,000 cubic feet per second of water was 58.8 feet. In 1937, when the crest was discharging 2,150,000 cubic feet per second, the gage at Arkansas City was 53.8 feet. In other words, in 1937 there was 362,000 cubic second feet greater flow than in 1929, and it passed 309 down the river at a stage 5 feet lower. In 1937 a 207 greater flood peak passed the Arkansas City gage than in 1929. The carrying capacity of the river at this point had been increased. At the time the 1929 peak discharge was passing down the river in 1937 the stage was about 10 feet lower.

The levee on the south bank of the Arkansas River has been built up to the 1928 grade and section authorized by the Flood Control Act of May 15, 1928, repairing the crevasses in the levee made during the 1927 flood. Witness produced profile known as a level profile of the south bank of the Arkansas River, and which was offered and received in evidence as Exhibit 63. Witness stated that at any particular point a direct comparison may be drawn between the profiles as they were actually observed or the levee tops as they actually were in 1927 or 1935. The location of the three crevasses is likewise shown on this profile, Medford at this point level of

1927, Pendleton and South Bend further upstream. Had this not been done, the 1935 high waters in the Arkansas River would have overflowed the same area that was overflowed in 1927, including the plaintiff's land.

By a comparison of aerial photographs taken in 1930 and 1936, we find there has been an increase of cultivation in the area covered by the Boeuf Floodway of 3.6%, with an increase of 2.5% of the area in the Boeuf Basin not in the floodway. The area not in the alluvial valley, or overflow district, for the period shows an increase of .2% in acreage. In the area in the Boeuf Basin not in the floodway there was a decrease of .6%. In other words, the percent of increase in cultivated lands in the floodway area is somewhat higher than in the area contiguous to Pine Bluff which would not be subject to overflow from crevasses in the Mississippi River.

A comparison of photostats of the area immediately  
310 around Arkansas City, including plaintiff's property, about 6 miles square, indicates an increased area of cultivated land between 1930 and 1936 of 5.87%; a decrease in brush and weeds of 1%; and a decrease of woods land of 4.08%. There was a greater amount of clearing in the vicinity of plaintiff's property than elsewhere in the Boeuf Basin.

#### Cross-Examination.

Cubic feet per second is the number of cubic feet of water passing a certain point in a second. During the 1927 flood it would take about 70,775 cubic feet per second to raise the gage at Arkansas City one foot.

The crest of the 1936 flood was 52.8 at Cairo on April 16, 1936. The crest of the same flood at Arkansas City was 41.3 feet. Therefore, in the 1936 flood the crest at Arkansas City was 11.5 feet lower than the crest at Cairo. During the 1937 flood, the crest at Cairo was 59.62 and at Arkansas City 53.86, or a difference of only 5.76 feet. The first cut-off below Arkansas City, Ashbrook cut-off, was opened November 14, 1935, but was not as effective in 1936 as in 1937. The Ashbrook cut-off south of Arkansas City was opened during April, 1936. It was opened November 14, 1935. In April, 1936, it had become defective to a very marked degree. Yet in 1936 the stage at Arkansas City was 11.5 feet lower than the Cairo gage, while in 1937 the difference was only 5.76 feet. So in 1937 the gage at Arkansas City lacked approximately 6 feet of being as much lower than the Cairo gage as it was in 1936.

In 1892 the records show a maximum discharge of 1,742,000 cubic feet per second at Arkansas City at a gage of 48.01.



At the same gage of 48.01 at Arkansas City on February 1, 1937, the discharge was 1,826,000 cubic feet per second. There were no cut-offs below Arkansas City in 1892. The 1937 discharge at the 48.01 gage was 84,000 cubic feet per second more than at the same stage in 1892, representing a 311 difference in gage of only slightly more than one foot taking 70,775 cubic feet per second to represent one foot on the gage.

In 1912, before any cut-offs were constructed, approximately 2,700,000 cubic feet per second of water was discharged down the Mississippi River at Arkansas City at a gage of 55 feet. In 1937 only 2,150,000 cubic second feet passed.

In 1890 at a gage of 48.8 at Arkansas City the discharge was 1,418,000 cubic second feet; and in 1892, two years 312 later when no cut-offs had intervened, at approximately the same gage at Arkansas City of 48.1, the total discharge was 1,742,000 cubic feet per second, a difference of 324,000 cubic feet per second greater in 1892 than in 1890, when there were no cut-offs to explain the difference.

In 1903, at a gage of 50.4 feet at Arkansas City, 67,000 cubic feet per second more water passed than in 1893 at approximately the same gage of 50 feet.

At a gage of 55 feet at Arkansas City the discharge in 1913 was 281,000 cubic feet per second less than the discharge at the same gage in 1912.

At a gage of 48.1 feet at Arkansas City on May 4, 1892, there was a discharge of 1,742,000 cubic second feet, and ten days later, with an increase of one foot on the gage at 49.1 feet, the discharge was 1,410,000 cubic second feet, or 322,000 cubic feet per second less.

In the same flood of 1892 between the stages of 48.3 and 48.1, just .2 of a foot difference in stages, the difference in the volumes of water discharge was 382,000 cubic feet per second.

On January 30, 1937, at a stage of 46.1 the discharge at Arkansas City was 1,753,000 cubic feet per second; whereas on March 4, 1937, in the same flood, at a gage of 45.9, or only .2 of a foot difference, the discharge was 1,390,000 cubic feet per second, or a difference of 313,000 cubic feet per second on a change of .2 of a foot on the gage.

In 1907, before there were any cut-offs, at a stage of 51.8 on the Arkansas City gage the discharge was 1,529,000 cubic

feet per second, whereas in 1935 at a gage of 51.7 feet the discharge was 1,386,000 cubic feet per second, or 143,000 cubic feet per second less discharge in 1935 than in 1907. The Leland cut-off below Arkansas City was in operation in 1935.

CAPTAIN J. S. SEYBOLD, on behalf of defendant, testified:

I graduated from the United States Military Academy in 1920, took degrees in civil engineering, have had various assignments of duty, reported to the Vicksburg Engineering District in 1934, and since March 1, 1935, have been in charge of the General Engineering Division. In the performance of my duty I supervise the collection of data concerning high-water profiles, river flows, river capacities, existing levee grades, gage records, and other engineering and hydraulic information. I am familiar with the data and exhibits presented by Mr. Morris, prepared under my supervision.

This data and these exhibits reflect that in the 1937 flood at the crest 362,000 cubic feet per second more water passed than at the crest of the 1929 flood, approximately 25% greater flow, at a 5 foot lower gage. The 1937 flood crest was below the 1914 grade line of the fuse plug levee by a minimum of 4 feet. At Arkansas City there was approximately 6 feet of free board at the crest of the 1937 flood. In 1937 a flood would first have overtopped the fuse plug levee at Vaulchuse or Luna Landing where there was the minimum free board.

I am familiar with the provisions of the Flood Control Act of June 15, 1936, which amended the Flood Control Act of May 15, 1928. This revision of plans for the floodway in the middle section was considered desirable for three reasons. One was to minimize the area subject to overflow. Second, to assure positive operation of a floodway, and third to take advantage of the increased channel capacity of the river obtained by operation of the channel stabilization program of the 1928 Act. Witness reads into the record Flood Control Act of June 15, 1936, commonly referred to as the Overton Act—Public No. 678, 74th Congress, Senate Bill 3531, and describes the Markham Plan authorized by the 1936 Act. Our surveying parties are now in the field surveying and working on the data for the authorized modifications. At the present time they are trying to obtain options on the land in the Northern extensions. If the options

are obtained in accordance with the provisions of the Act, and if funds were available, the Plan would go under construction under the approval of the Mississippi River Commission. There will be difficult drainage questions to be solved and economic studies must be made and planned to balance the cost of the land against the height of the levee. The designing and engineering features require a considerable length of time. We are going ahead as rapidly as our funds permit. We have abandoned the Boeuf Spillway. The witness produced a map showing the general features of the Overton Plan in the Middle Sections. This was offered and accepted in evidence and filed as Exhibit 68.

### Cross-Examination.

The provisions of Section 2 of the Overton Bill that expressly provides that the Boeuf Floodway "shall be abandoned as soon as the Eudora Floodway \* \* \* is in operative condition and the back-protection levee \* \* \* extending North from the head of the Eudora Floodway, shall have been constructed" is a question of law. We are doing no more construction work toward completing the Boeuf Floodway. That means we have abandoned it. The protection given the land in the Boeuf Basin is the same as it has always been except it has been materially increased. In my opinion there is no Boeuf Floodway. My interpretation of Section 2 of the Overton Bill (Flood Control Act of June 15, 1936) is the Boeuf Floodway plan will still be in operation.

Under the provisions of the Flood Control Act of June 15, 1936, that stretch of low levee at the head of the Boeuf Floodway, designated as a fuse plug, is to continue just as it 315 has been left since 1928. There is no change to that section of the levee in the new law. It is left at the 1914 grade.

There has been no preparation to carry out the construction authorized by the Overton Bill. Very few flowage rights required by the Overton Bill have been acquired so far. The Markham Plan, authorized by the Overton Bill, so far is nothing but a paper plan, an optional plan. I cannot say whether or not it will ever be executed. Even the details of the plan have not yet been worked out, much less approved by the higher authorities. We have not yet decided where would be the most effective place to put the intake into the upper floodway with reference to Arkansas City from the standpoint of controlling the floods of the Mississippi River.

GEORGE R. CLEMENS, on behalf of defendant, testified:

I live in Vicksburg, Mississippi, where I have been senior hydraulic engineer for the Mississippi River Commission since 1931. I received a degree in engineering from the University of Michigan in 1921, since which time I have specialized in hydraulics and have continually practiced by profession. I spend about one-half of my time actually on the river and keep intimately informed as to the results accomplished by river activities. I personally observed the 1937 flood fight from Cairo downstream, and made several official inspection trips to the New Madrid Floodway to observe the crevasses and the effect of flood in the floodway area. A number of my articles on flood control of the Mississippi River have been published.

316 The term flood means water in excess of the bankfull capacity of a natural stream. When the river flow reaches the stage where it spills over the banks a flood exists however small the area. No two floods are alike. Even floods of the same rate of flow may differ in gage height because of different channel conditions. It is possible to improve the river channel and cause more water to be carried at the same height on the levees. I have thoroughly covered the alluvial valley of the Mississippi and am familiar with its characteristics, and the history and development of its levee system. Before men entered the valley the entire alluvial plane was subject to overflow. As the first settlers came into the valley they began to protect various portions of that plane beginning with the small levees in the vicinity of New Orleans in 1717. As the development of this alluvial valley increased, levees and other means of protection were established for various portions of the valley. It was not possible to protect the entire alluvial valley, or even to protect those portions which were protected from all floods. The plan of protection in the early days developed in a hit and miss fashion, protecting as much area as means and money permitted. In 1882 the Mississippi River Commission was formed and from that time on assisted in studies of the river system. Later the Commission assisted financially the local interests, increasing the size of the flood that was held out from the natural overflow areas. All areas were never protected. By 1927 a fairly complete system of levees had been built along the Mississippi River, but the great flood of 1927 broke these levees and overflowed the land. Local communities felt they had reached the limits of their resources and the job was too great for them. The construction of the main protection features were then taken over by the United States



Government by the Flood Control Act of May 15, 1928, the Government building levees to protect as much land as was practicable in the valley from as high a flood as they considered it possible. Certain new features were embodied in this plan. Different areas have different degrees of protection.

A very large area or acreage between the levee lines and in the back-water areas at the mouths of the various tributaries of the Mississippi River have no flood protection whatever under the Jadwin Plan, as is shown by the maps.

The Mississippi River Commission assisted financially in the local interests' construction activities in adding to the areas of protection and increasing the size of the flood that was held out from the natural overflow areas. There were certain areas that were not protected and they were only protected from certain floods.

The people in the Arkansas and White River back-water areas and within the general bounds of those areas which I have described above have no flood protection. The people living near Mozart and lands located nearby are overflowed by a relatively small flood that comes down the Arkansas River. The area near Indian Bay or Turner requires a somewhat larger flood to overflow it but these areas are flooded at the expense of the area within the Boeuf Basin and within the so-called Boeuf Basin floodway.

Our work of stabilization under the Jadwin Plan has lowered the flood height throughout the reach of the Mississippi River from the Arkansas River to below Vicksburg, affording a quicker run-off of water and thus protecting much land in many floods that would otherwise be overflowed. In 1929 a natural cut-off occurred at Yucatan Bend and the effects were carefully observed. Later in 1932 additional studies were made and the program for making artificial cut-offs was initiated. The first cut-off begun was that at Diamond Point in the fall of 1932, and the work of making cut-offs has continued to the present time. Eleven cut-offs have been completed shortening the river approximately 100 miles. After a cut-off is opened it requires some time and high stages of the river to properly develop it. We are dredging the river within the reach through which we have cut-offs, and constantly watch the cut-offs. The major tests of the efficiency of the cut-offs occurred in the 1937 flood which demonstrated there had been a progressive lowering of the flood height of the river as a result of the cut-offs. The 1937 flood was the greatest confined flood that was ever

held by the Mississippi River levees. The 1937 flood had a discharge at Arkansas City of approximately 360,000 cubic feet per second more than the 1929 flood, but was carried at a stage of 5 feet lower. The free board of the levee at Lucca Landing or Possum Fork, above Arkansas City, during the crest of the 1937 flood was 5 feet, but at Vacluse, below Arkansas City, it was slightly less than 4 feet. From this

319 I would say that the levee would first have overtopped during the 1937 flood in the vicinity of Vacluse, approximately 35 miles below Lucca Landing or Possum Fork, approximately 25 miles below the plaintiff's property.

From my observation of crevasses I would say that sanding of property does not extend over two miles from the crevasse. Timbered area reduces the velocity of flow and sand is dropped when the velocity decreases. If the fuse plug levee should overtop or crevasse near Vacluse, some 25 or 30 miles from the plaintiff's property, most of the water would flow downstream and there would probably not be sufficient backwater to reach the plaintiff's property. I do not think the bottle-neck above Arkansas City endangers the fuse plug levee in that area. In the 1937 flood the levee at the bottle-neck had more free board than the levee below the bottle-neck at Luna Landing. In the 1937 flood the levee at the head of New Madrid Floodway overtopped first about 12 miles below the bottle-neck in that vicinity, rather than above the bottle-neck where we wanted it to. I don't think the bottle-neck has any bearing on the point of where the fuse plug levee will first overtop or breach.

320 The 1927 flood has been estimated at a confined crest flow of approximately 2,460,000 second-feet. The 1937 flood was 2,150,000 second-feet, or 300,000 second-feet less than in 1927, and passed Arkansas City with a freeboard of 6 feet and a freeboard of 4 feet at Luna. Therefore I would say a flood 25% less than the 1927 flood could now be safely passed by the fuse plug levee. I am of the opinion that the floods of 1912, 1913 and 1916, all of which overflowed plaintiff's property, can now be safely carried in the river without overtopping the present levee system between the Arkansas River and the Red River. With a proper high water fight, I believe the 1927 flood could be carried by the fuse plug levee section now. I am not certain, but they would have a reasonable chance. In my opinion, the protection of the plaintiff's property has been materially increased since the passage of the 1928 Act.

## Cross-Examination.

I would not have the Court understand from my testimony that I recommend the building up of the fuse plug levee to the 1928 grade and section. After the Eudora Floodway has been completed I see no objection to building the fuse plug levee at the head of the Boeuf Basin to the 1914 grade and 1928 section as provided by Section 10 of the Flood Control Act of June 15, 1936, the Markham Plan. I have not undertaken to speak authoritatively for either the Chief of Engineers or the Mississippi River Commission, but have given my own personal views gained from my own experience with the river.

Caulk's Neck cut-off east of Lucca Landing and the fuse plug levee, has been opened since this trial began. When fully developed it will eventually be approximately the same width as the average width of the river through that stretch. During the period of development, and during high water, the velocity of water through this cut-off will be high. The upper, intake end of the cut-off is approximately 8 feet higher than the lower, discharge end, resulting in a swift  
 321 current through the cut-off during the period of its development. Swift velocities may work on the bed of the stream as well as on the banks. I do not at the present time agree with the statement in House Document 90 by the Chief of Engineers that the increased velocities caused by cut-offs are dangerous in that they cause caving banks.

I was in charge of the Cairo office when on Saturday night, January 24, 1937, the Army Engineers dynamited and blew out the fuse plug levee at the head of the New Madrid Floodway for the purpose of protecting the inhabitants of Cairo. We had purchased the right to overflow that floodway when necessary, and that was a part of the flood fight. For days we had been trying to get some people out of the floodway. We were using the New Madrid Floodway as it was intended to be used by the Jadwin Plan and were trying to protect the other levees from overtopping on the people of the Mississippi Valley.

The low section of the fuse plug levee in the neighborhood of Vacluse during the 1937 flood was a comparatively short section of the levee that could have been protected by topping within a comparatively short time. I do not know whether or not it was left that way for the purpose of this lawsuit. That levee at Vacluse under the Jadwin Plan would eventually be raised to the 1928 grade, and there is no doubt of the authority of the Army Engineers to raise that

low section of the levee 3 feet higher than the fuse plug levee to the north. If the levee should break at Vauclose then it would not be functioning as intended by the Jadwin Plan.

When the crest of the 1937 flood reached the mouths of the Arkansas and White Rivers the discharge from those rivers was 100,000 cubic feet as compared with 1,200,000 cubic feet in 1927.

322 The Bonnet Carre Floodway, as well as the Birds Point-New Madrid Floodway, functioned during the 1937 flood substantially as those two floodways were designed to function under the Flood Control Act of May 15, 1928.

In establishing grade lines for levees, the Mississippi River Commission undertakes to follow the slope of the river in order that the freeboard of the levee, which is the portion of the levee above the surface of the water, will be approximately uniform throughout the river. During the 1937 flood this freeboard varied from less than nothing at Cairo, where the water went above the top of the levee, to more than 11 feet of freeboard at some places in the lower river.

Referring to the 1937 flood as a "flash flood" is the layman's term. Every flood is unusual. It is unusual in its manner of development and behavior. We have made all characters of observations on the cut-offs since they were started in 1932. I have studied the records of the natural cut-offs in the Mississippi River for the preceding 150 year period during which the Army Engineers were preventing cut-offs as being dangerous rather than making them artificially. General Jadwin was Chief of the Army Engineers when he was of the opinion that cut-offs were dangerous when the Flood Control Act of May 15, 1928, was passed.

A number of elements cause levees to crevasse, such as a steamboat running into the levee line, crayfish holes in the levee, slides and sluffing on account of the texture of levees, seepage, faulty foundations, wave wash, overtopping, et cetera.

It was not intended by the Jadwin Plan to protect the land between the levee lines, nor the back-water areas at the mouths of the Red, Yazoo, White, Arkansas and St. Francis Rivers, which have always been subject to overflow. The overtopping of the fuse plug levee would reduce the back-water area at the mouths of the White and Arkansas Rivers, a part of which has been converted into a game refuge  
323 by the United States Government. These areas are all arms of the so-called natural storage basin of the



river. In designing the Jadwin Plan the effectiveness of these reservoir areas were taken into consideration. Plaintiff's property is not in any of these back-water areas shown on the map.

The two cut-offs nearest plaintiff's property, Tarpley Neck, a short distance above Greenville, and Ashbrook Neck, below Arkansas City, were both cut since the present lawsuit was filed in August, 1934, as also were the cut-offs at Sarah and Rodney.

The following statements relative to the 1937 flood and the cut-offs, taken from a paper which I read at a meeting of technical engineers about 30 days ago, are correct:

"Fortunately for the lower valley the upper Mississippi was relatively low. . . . In June, 1932, Brigadier General Harley B. Ferguson was detailed as President of the Mississippi River Commission. A study of revetments indicates that in some cases at least they actually reduce the flood carrying capacity of the river by decreasing the river cross-section at bank-full stage. Levees admittedly raise stages by confining the flow to a part of the former flood channel. Dikes on necks have been built to prevent flow across the neck, holding up the water at the upper side of the neck and preventing its unobstructed downhill flow. I don't know why these dikes were built before the year 1932. This work of levee and channel improvement cannot be laid out in detail in advance, but must follow the river's movements. The river is a live, moving, changing thing, and should be treated as a live patient. On Sunday, January 24, the situation was rapidly becoming acute and orders were issued to open holes in the fuse plug levee at the upper end of the New Madrid Floodway, permitting the overflow in that area as soon as possible. During the night a dynamiting expedition was organized under the direction of Major Burdick to accomplish this. Three large crevasses were opened in the fuse plug levee using a total of approximately 10 tons of dynamite to open approximately 1,000 feet of crevasses. The New Madrid Floodway functioned essentially as planned and protected not only Cairo but the entire St. Francis Basin from a flood that would have overtopped the levees as they stood in 1927. About 500,000 cubic feet per second was carried in the floodway. Below Tiptonville the flood began to feel the straight jacket of Old Man River being confined by the levees. It continued to roar and rail, working its vengeance on some protected places. Another factor that helped the flood fight on the lower river floodway was the relatively good behavior of the White and Arkansas. They

were relatively low. They had a less flood wave than they had in 1927. There was an early flood on the White but it was largely out of the way, helped by the improved channel, before the main flood reached Arkansas City. One of the questions most frequently asked regarding the 1937 flood is, what was the effect of the cut-offs and channel improvement work? The complete answer is far too complicated to give in a few words, and many of the details will not be known for some time. The flood fight from Arkansas City to 324 Vicksburg was a very tame affair. There was never any danger. Below the Arkansas River the 1937 flood lacked almost one-third of reaching the crest flow provided for by the Jadwin or Markham Plan. It is surprising that there should have been so much hysteria as the flood approached the lower Mississippi Valley."

General Harley B. Ferguson, then just appointed to the Mississippi River Commission, initiated the program of channel stabilization by cut-offs in June, 1932. The program involves cut-offs plus dredging between the cut-offs and maintaining the improved channel. Three years ago a bold attack on the historic problem of controlling the Mississippi River was begun on a radically new line. Long standing tradition asserted that the river's wild course must not be changed, and its countless bends must be held at all hazards. Accordingly millions of dollars were spent on dikes to prevent the breaking of narrow necks, and on revetments to armor caving banks against further erosion. In the new attack this tradition was discarded and cut-offs were made across a number of bends. A number of years will be required to determine the full value of the cuts to navigation. Any conclusions at this time, (February 20, 1936), as to the ultimate effect of the cut-offs on the Mississippi River would be premature. I am 37 years old. The statement made by the witness above read and incorporated and a statement written by him on the 1937 flood, was made in February, 1936 and at that time they had not had the 1937 flood. At the present time they have a great deal more information and know what the cut-offs will do in a deep flood and at the time of the article they had not had the peak big flood.

Here the defendant rested.

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E. B. WHITTAKER, in rebuttal for plaintiff, testified:

I live in Little Rock, Arkansas and am in charge of buying land in this State by the Resettlement Administration of the United States Government.

Neither Mr. Frank Masters of Lake Village, Arkansas, nor anyone else was authorized to offer the owners of the Macon Lake plantation \$37.50 an acre for their land on behalf of the Resettlement Administration. As a matter of fact, the Macon Lake plantation is in the Boeuf Floodway as created by the Flood Control Act of May 15, 1928, and it is the policy of the Resettlement Administration in Arkansas, not to consider the purchase of any land in that floodway under the Jadwin Plan. We did not believe we would be safe in placing some farmers in that area. We will not buy land unless it is in a protected area, if we know it.

#### Cross-Examination.

We did buy some land that was overflowed from the Arkansas River in 1927. We do investigate and consider the tax structure which has some influence on our land purchases. We try to buy land where, considering all the conditions, the chances of success will be greatest.

When we considered the flood menace to land within the Boeuf Floodway created by the Jadwin Plan, that was enough to eliminate the land within that floodway from further consideration by us.

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E. B. HARRIS, in rebuttal for plaintiff, testified:

I live in St. Louis, Missouri, where I have been Assistant Secretary of the Federal Land Bank of St. Louis for the last 15 years. When the creation of the Boeuf Floodway in Southeast Arkansas by the Flood Control Act of May 15, 1928, was brought to the attention of the Federal Land Bank of St. Louis, we made certain investigations as to the security values of real property lying on the floor of that floodway, and decided, due to the flood hazard, we could not make loans in that area. The Federal Land Bank adopted the policy of declining to make land bank loans on the property located in the Boeuf Floodway the first part of 1929. That policy has been continued until this time.

As to the records of loans in the general vicinity of the floodway in Southeast Arkansas, made since the Flood Control Act of May 15, 1928, there were a few obligations we had already approved during 1928, that were closed thereafter. Also some mortgages appearing on the record were sales made by the Federal Land Bank of farms we own, to secure the purchase price of which we took back a mortgage on the land. The Land Bank Commis-

sioner, not the Federal Land Bank, made some loans in that area.

According to my records of the loans which were pending when the Flood Control Act of May 15, 1928, was passed, and completed thereafter, only three were in Chicot County and none in Desha County. Of the mortgages taken to secure purchase money for sales made by the Federal Land Bank, two were in Chicot County and one in Desha County. All other mortgages of record to the Federal Land Bank of St. Louis represent loans that we understood were not in the Boeuf Floodway.

The Federal Land Bank loans money which it secures from the sale of bonds to general investors, and we have to protect the bondholders. The Commisisoner's loans are made under a special Act of Congress and are more or less Government money for which we are not quite so strict as to the security required on the Land Bank loans. The Commissioner's loans are for shorter periods of time and certain chances can be taken on them. The Federal Land Bank had quite a number of loans in that general area before the passage of the Flood Control Act of May 15, 1928. Our records show we have foreclosed all our loans in Desha County.

The only loan in the vicinity of plaintiff's property was the Lacey loan on a farm of 240 acres located three-fourths of a mile from the plaintiff's land. We loaned \$3,400 on that Lacey farm in 1920. After foreclosing the mortgage, we resold this farm on the open market in October, 1931, for \$750.

#### Cross-Examination.

In making its loans the Federal Land Bank also considers the tax burdens and drainage problems, and stays out of territory where the tax burden is excessive. We have refused loans in territories outside of the Boeuf Basin because of excessive tax burdens. The main reason we stayed out of the Boeuf Floodway area was due to the Flood menace. For that reason we decided we could not make loans in that  
328 basin and the other factors were not taken into consideration.

In Chicot County we have a total of 96 Federal Land Bank loans in the entire county. Only 5 of these loans made since 1928, were in what we considered the floodway, and these were loans which we took back for the purchase price of land we sold, and 3 of them were loans which were pending at the time the Act was passed. I do not have any personal knowledge of the list of mortgages in that area which you pre-



sent to me. The bank has about 87,000 loans in force. I have with me only memoranda as to our records of the loans that we made in the Boeuf Floodway, and cannot now testify as to mortgages outside of that territory. I can verify the records on my return to St. Louis if you desire.

### Recross Examination.

I was asked to bring with me only the records of the loans held by the Federal Land Bank in the Boeuf Floodway in Desha and Chicot Counties. If the records show other loans have been made in these two counties of which I do not have the records with me it is because the Federal Land Bank understands such loans are not in the Boeuf Floodway. If a large part of land is outside of the floodway, a sufficient amount of itself to justify the loan in the judgment of the bank, we would make the loan even though some of the land might be over in the actual floodway. I would not mark such loans as being in the floodway. My testimony is based upon careful search of our records made on three different occasions.

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### J. I. KELLY, in rebuttal for plaintiff, testified:

I have lived at Halley in Desha County, Arkansas, 32 years, during which time I have been familiar with the land values of that county. On June 22, 1926, I sold 80 acres of land two miles east of Halley, not on any improved highway, of which about 68 acres was in woodland and 12 acres 329 was in cultivation, for \$2,500, or more than \$31 per acre, as shown by this certified copy of the Deed. In May, 1925, W. I. Best sold 80 acres in that community, of which 45 acres was in woodland and 35 acres in cultivation, for \$3,600, or approximately \$45 an acre. These represented fair market values in that community until it was learned in 1929, that these lands were subject to flooding as the result of the Jadwin Plan.

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### MRS. EUGA M. SNYDER, in rebuttal for plaintiff, testified:

I have lived in Desha County, Arkansas, about 15 years. On September 5, 1922, as shown by Deed exhibited, my husband and I bought 44 acres of land about 3 miles north of McGehee to use for the purpose of farming, for which we paid \$6,000, or approximately \$136 per acre.

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**S. C. RILEY**, in rebuttal for Plaintiff, testified:

I live in Halley, Desha County, Arkansas, and am familiar with the 50 acres of land about  $2\frac{1}{2}$  miles east of Halley, not on any improved highways, of which 42 acres was in cultivation and the rest in the woods, which was sold by S. C. Riley on November 23, 1926, as shown by this Deed I exhibit, for \$4,200 in cash. These values continued in that community until it was generally known that the Jadwin Plan had been adopted. The map shows this land is in the floodway.

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**MRS. ETHEL COURTNEY**, in rebuttal for plaintiff, testified:

I have lived in Halley, Desha County, for 16 years, and have assisted in managing the business affairs of my mother-in-law Mrs. Emma E. Courtney. I am familiar with the 80 acres of land bought by Emma E. Courtney from Shirley Willis, October 27, 1924, for \$800 as shown by this Deed I exhibit. This land was entirely in the woods, on no improved highway.  $2\frac{1}{4}$  miles east of Halley, cutover timber land. During that period and up until about 1928, we paid around \$40 per acre for such land in the woods in that community. The market value of cultivatable lands during that period was around an average of \$75 to \$100 per acre. We were buying and selling land constantly, and lending money on land during that period, and I am familiar with the land values. The Macon Lake plantation is located 5 miles below Halley on the State highway running South. The value of cleared land in the vicinity of Halley continued from \$100 to \$125 per acre until after it was definitely known we were in the fuse plug area. In 1936, we bought 67 acres for less than \$8 an acre.

Cross-Examination.

In January, 1937, I transferred 154 acres of land in this vicinity to my mother-in-law, Mrs. Emma E. Courtney, reciting a consideration in the Deed of \$4,000. The 1927 flood was the largest we ever had. We are as much interested in the outcome of these suits against the Government as anyone else in the floodway.

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**R. E. FURLONG**, in rebuttal for plaintiff, testified:

I have lived in Arkansas City, Desha County, Arkansas, 34 years, engaged in farming and contracting work. On January 25, 1927, I bought from Missouri State Life Insurance Company 22.32 acres of land, of which 17 acres was subject to cultivation, about 2 miles northeast of plaintiff's land, for

which I paid something more than \$98 per acre. This land is not located on a paved highway like plaintiff's land. It is a mile and a half north of Arkansas City and the road. Those values continued in that community until in the Fall of 1928, or early in 1929, when we heard we were put in the river by the Jadwin Plan.

#### Cross-Examination.

This land is within the floodway under the Jadwin  
331 Plan. I bought the land before the flood of 1927.

After the flood of 1927, prices or values did not decrease until after the Jadwin Plan. Probably 5 feet of water was on this land during the 1927 flood. The water was on the property until too late to make a crop that year. The 1927 flood was the greatest flood we ever had, but we figured we were not really damaged except as to the buildings on the property. The flood did not decrease the market value of the property. We had floods in 1912 and 1913 and they did not decrease the value of our land. No flood waters have been on the land since 1927. There is no value on our property now. We do not consider it worth anything, ordinarily speaking. I let my property go back in 1930 to the people from whom I bought it. The depression had nothing to do with this particular deal. Other farmers in that community were permitting their lands to be forfeited for taxes.

#### Redirect Examination.

I own a home in Arkansas City. I have no suit whatever against the United States for damages.

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A. P. PRICE, in rebuttal for plaintiff, testified:

I have lived in Arkansas City, Desha County, for 32 years, farming. As shown by this exhibited Deed, on February 6, 1922, I bought 800 acres of land about one mile north of Arkansas City, on a dirt road, of which 300 acres was in the woods, for \$40,000, or an average of about \$50 per acre for woodland and cleared land together. Those values continued in that general vicinity until it was generally known definitely that we were thrown in the spillway under the Jadwin Plan.

After I bought this land, in 1923, I borrowed on it from the National Life Insurance Company of St. Louis, \$50,000. They valued the cleared land at that time at \$120 per acre. I lost this land in 1930. It has had no stable value at all since it has been in the Boeuf Floodway. Since I lost this \$120 an  
332 acre land I have bought additional land in that vicinity in the Boeuf Floodway, adjoining the plaintiff's land on the south, for less than \$1 per acre, paying \$100 for

160 acres from Dr. French. I have bought 87 acres from Mr. Thane, in 1933, for \$1 an acre.

#### Cross-Examination.

These lands I bought in the floodway had not been forfeited to the State. I do not recall the amount of delinquent taxes that had accumulated against the property, but something like 4 years. Of the 240 acre tract which I bought about 65 acres were in cultivation. The land I bought nearest to the plaintiff's land is in the drainage district, the levee district, the school district, like all these lands in that vicinity, so that the total tax burden against the land, I think, amounts to something over 90c a year. I have put about 115 acres of the woodland in cultivation, and have put tenant houses, barns and improvements, all of which I presume cost around \$1,500. The land is in the floodway like plaintiff's land, but is very fertile land. It will make a bale of cotton to the acre and be cheaper then you can rent it anywhere else. It is certainly worth the gamble at the price I paid.

Nearly every farmer who borrowed money met more or less trouble, but not so much out in the area where things were more stable. The land I lost went through all the past floods, but they did not damage the dirt and market values did not shrink them. Cultivated land such as mine rents at from \$5 to \$12 an acre depending upon type and improvements. We generally work the land on shares, meaning if the landlord furnishes the farming equipment he gets half the crop and the tenant gets half; if the tenant furnishes the farming equipment the land owner gets one-third of the corn and one-fourth of the cotton. These rentals applied back in 1925 and 1926. The low price of cotton does not necessarily decrease the market value of the land. The cotton market fluctuates of course, but a man who has a good piece of property naturally wouldn't want to sacrifice it just for  
333 one year.

#### Redirect Examination.

I was able to discharge all of the delinquent taxes and assessments on the lands I bought by paying them for one year only.

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W. M. NEPTUNE, in rebuttal for plaintiff, testified:

As an engineer I have been studying the cut-offs and their effects since 1933, and when I testified on direct examination I had substantially all of the information which has come into the record from the Government's expert witnesses. Due to the change in channel conditions brought about by these



cut-offs, a new cycle of bank erosion seems to be inaugurating. At the points where the front line levees are closely adjacent to the river bank, there is an increased danger of the loss of that levee line caused by the caving banks, which increases the flood hazards of the property behind those levees. When the increased hazards of these cut-offs is weighed against the temporary lowering of the flood stage of the river at Arkansas City as testified by Government Engineers, it is my conclusion that the cut-offs have not increased the protection of plaintiff's property or this area. Whatever effects have resulted from the operation of the cut-offs to date are temporary and local. There is nothing as yet to justify the assumption that they may be permanent.

In order to determine whether or not the cut-offs have reduced the slope or drop of the river throughout the area of the fuse plug section I have prepared a graph as the result of studies which I have made of former floods of record since 1874, which I introduce as Exhibit No. 76, as follows:



DROP IN FEET FROM ELEVATION AT MOUTH OF WHITE RIVER

MOUTH OF WHITE RIVER

ARKANSAS CITY

ARKANSAS CITY

LELAND

WORTHINGTON

ADAM

GREENVILLE

WILSON

POWELL

LAKE PROVIDENCE

DIAMOND

VICKSBURG

1887

1874

1838

1809



WILLOW POINT

DROP IN ELEVATION OF FLOOD WAVES  
FROM MOUTH OF WHITE RIVER TO ANGOLA  
GREATEST & LEAST - ALL FLOOD WAVES 1874-1935 INC.  
FLOOD WAVE OF 1929  
FLOOD WAVE OF 1936  
FLOOD WAVE OF 1937  
CUT OFFS.

LAKE PROVIDENCE

DIAMOND  
VICKSBURG

YACATAN

ROSEY

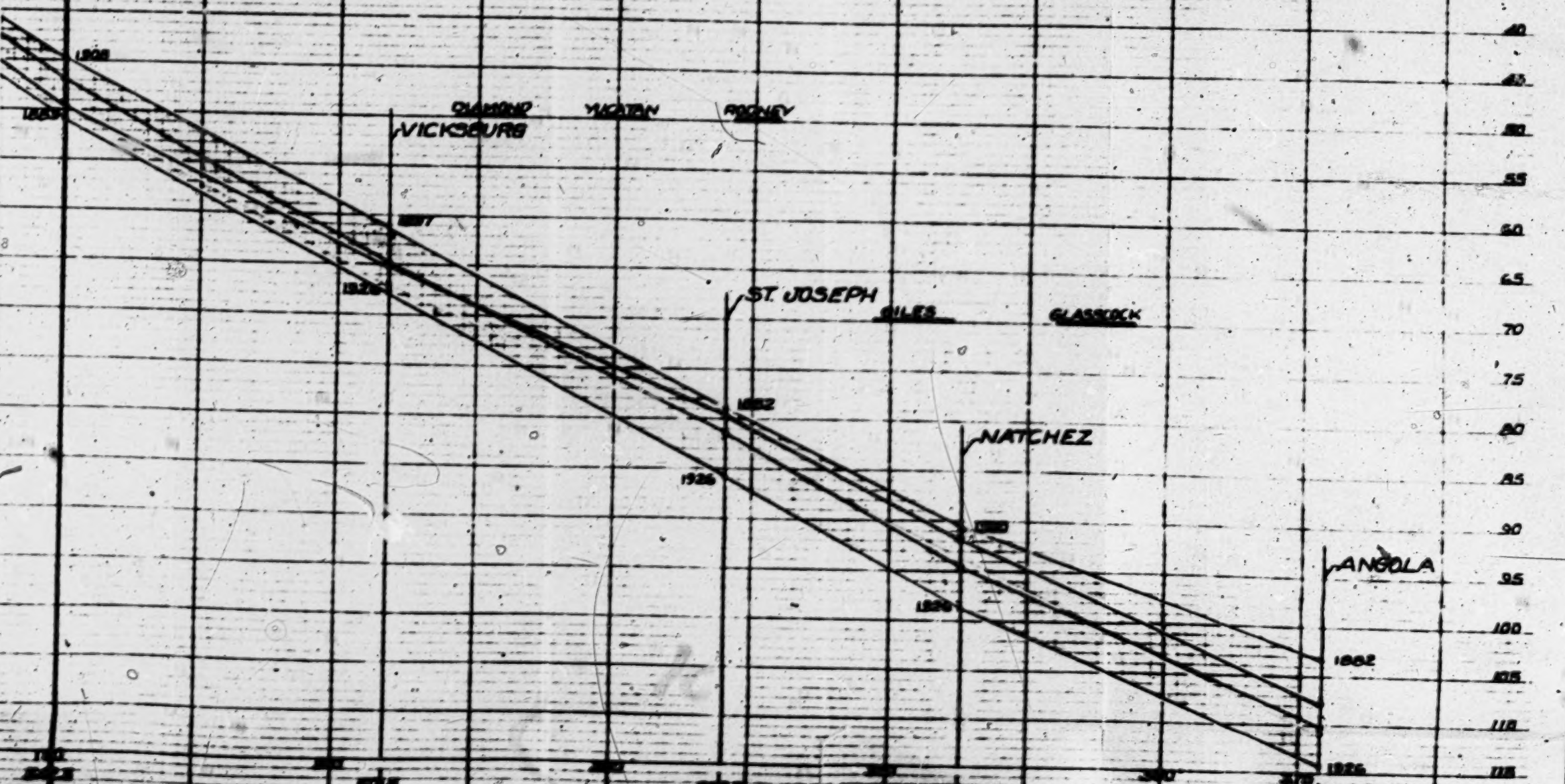
ST. JOSEPH

SILES

GLASSCOCK

NATCHEZ

ANGOLA







335 This graph represents an assemblage of some 92 separate flood waves at the mouth of the White River, and extending down to the mouth of the Red River at Angola. The shaded band shows the composite elevations of these flood crests at the various points of the Mississippi River between the mouth of White River and the mouth of Red River. The crests of the floods of 1929, 1936 and 1937, are represented by the heavy lines so marked. The location of the cut-offs are also indicated. The records, and this graph, show that below Greenville the flood crests of 1929, 1936 and 1937, are within the shaded band of the range of differences of flood crests which have been established by the past river records at those gauge points. Only at Arkansas City does the line of the flood crest of the 1936 and 1937 floods fall below the band or range which the gauge at that point had experienced in the past. The crest wave of the 1936 flood showed a relatively greater drop throughout the range of gauges down to Lake Providence than the drop of 1937. The divergence from the former range of floods at Arkansas City, up to 1933, was a drop of approximately  $4\frac{1}{2}$  feet in 1936, and  $1\frac{1}{2}$  feet in 1937.

This difference between the amount of drop registered in the 1936 flood and the 1937 flood indicates that the maximum results from the cut-offs were obtained in 1936, and that they are temporary in effect. This is in accord with the general experience with cut-offs, and with all the general trend of the literature on cut-offs. The tendency of an alluvial river like the Mississippi is to maintain its natural length. When cut-offs are made, the river forms new bends and loops so as to return to its original natural length. The new cycle of erosion to which I have referred as resulting from the cut-offs is tending to restore the original length of the river.

According to all our literature, and according to the measurements observed, the general effect of cut-offs is to speed the velocity of the river through the cut-off. This tends to lower the flood level above the cut-off, and the river  
 336 restores itself by piling up the water below the cut-off. The cut-offs made in the Mississippi River have not made any measurable change in the river at the mouth of White River.

The cut-offs are most effective while the river flows in its natural channel between its natural banks. When the river leaves the bank-full stage and begins to overflow between the levee lines, from the bank-full stage upward to the top of the levee line on either side the effect of the cut-offs is progressively less as the water rises. There is no flood menace be-

hind the fuse plug levee until the water approaches the top of the fuse plug levee. When this stage of the river is reached, the flood plane of the river is from the top of the levees on one side to the top of the levees on the other side, and at this point the cut-offs will be of so little effect as to be of no substantial protection whatever to the plaintiff's property.

I am familiar with the engineering features of both the Jadwin Plan (Flood Control Act of May 15, 1928), and the Marham Plan (Flood Control Act of June 15, 1936). In neither of these plans is any provision made for changes in the grade of the levee lines as established from Arkansas City to the mouth of Red River to take care of the increased hazards to the levees below the cut-offs. The Flood Control Act of May 15, 1928, specifically recognized that a system of cut-offs was not to be included in the plan adopted.

When the Caulk's Neck cut-off above Arkansas City develops into a substantial channel, it will tend to restore the flood lines at Arkansas City more closely approximating the original flood bank as shown on Exhibit 76. The operation of Caulk's Neck cut-off will transfer the point of greatest effect approximately to the head of the fuse plug levee, below the mouth of White River, the beginning of the back-water area, and the present increase in elevation near Grenville will be moved upstream and up the fuse plug levee.

337 The increased velocity of the Mississippi River through the Caulk's Neck cut-off will be directed on to the fuse plug levee in the vicinity of Lucca Landing. The opening up of that new cut-off channel and diversion is apt to increase the erosion that is now taking place in the head of Cypress Bend, where the fuse plug levee is relatively close to the bank of the river. This is where even at present the fuse plug levee will probably first crevasse.

The 1937 flood cannot be regarded as a fair test of the permanent effectiveness of the cut-offs so far as plaintiff's property is concerned. It is not safe to assume that the 1937 measurements can be used as a measurement for any following flood. When the 1937 flood crest was about to reach the fuse plug levee, the reservoir area beginning at the mouths of the Arkansas and White Rivers was relatively empty.

When the swift velocities through the cut-offs are retarded after it passes the cut-offs, the sediment that is being carried by the stream deposits and forms shoals and bars in the river. These velocities create new zones of erosion and new zones of silting, requiring continual dredging.

In my opinion the local interests have no right to raise the fuse plug levee above the 1914 grade. It cannot be done without destroying the effectiveness of the Jadwin Plan. One of the designated elements of the Jadwin Plan is to keep the fuse plug levee as such in order to preserve the elevations of the levee system above and below it.

When the flood channel of the Mississippi River reaches a stage of 60.5 feet on the Arkansas City gauge, the point where the fuse plug levee would be overtopped so as to injure the plaintiff's property, the surface of this flood plane has not been shortened at all by the cut-off system. Topographically, the Arkansas River is just as far from the Red River as it was before the cut-off system was started. All that has  
338 been shortened by the cut-offs is the channel of the river within its natural banks, which channel flows back and forth within the flood plane as defined by the levee lines.

One of the defendant's witnesses stated that one of the reasons for the modification of the Jadwin Plan was to take advantage of the increased channel capacity of the river that has been obtained from the channel stabilization program, meaning the cut-offs. No such reason is given by the Chief of Engineers in Committee Document No. 1, which is the basis of the Flood Control Act of June 15, 1936. To my mind, cut-offs have not stabilized the channel. They are an element of instability. They radically change the established channel conditions.

One of the Government witnesses testified that the slopes in the river have tended to parallel since the cut-offs. On the contrary, there have been material changes in the slope between Arkansas City and Angola, almost unprecedented in the 1937 flood between the mouth of the Arkansas River and Lake Providence.

With reference to the difference in the discharge capacity of the Mississippi River in the latitude of Arkansas City in the 1937 flood as compared with the 1929 flood, that difference does not seem to be an unusually large variation in discharge between any two floods, regardless of any cut-offs. Going back over the record of observations on the river before there were any cut-offs, there are several instances where a difference of much the same magnitude is observed between different floods in different years, and between different days of the same flood in the same year. Each flood wave varies in its discharge as compared with other flood waves of approximately the same gauge height. Such variations in the discharge of different flood waves is the natural and normal con-



dition, and varies from year to year with different types of flood crests. A sharply rising flood, similar to that of 1937,

339 will show an abnormally higher rate of feet discharge as compared with a long sustained flood, with a series of peaks pyramiding on a full lower river, like the floods of 1927 and 1929, which invariably give higher readings on the gauge and comparatively low feet discharge rates as compared with the height of the gauge.

The hydraulics of the Mississippi River have not yet been developed. We are still trying to develop it. There have not been enough sustained observations on the Mississippi River as yet to develop its hydraulics.

No flood reaching the mouth of the Arkansas River from the upper Mississippi River has been sufficient to overflow or crevasse the fuse plug section of the levee since it was closed in 1921. This is true of all of the levees from the mouth of the Arkansas River to the mouth of the Red River. In 1927 there was a combined flood from the upper Mississippi and from the White and Arkansas Rivers reaching the mouth of the Arkansas River at practically the same time. This produced an unusually large flood in the middle section of the Mississippi River. The land in Arkansas was overflowed in that flood by Arkansas River water crevassing the levees on the south bank of the Arkansas River.

For the sake of safety, a levee line should have from 3 to 5 feet of freeboard. During the 1937 flood there was a minimum freeboard of 4 feet on the fuse plug levee at one place. In 1937, the maximum reported discharge at Arkansas City was 2,137,000 cubic second-feet. Only approximately 170,000 cubic second-feet were coming out of the Arkansas and White Rivers in 1937. In 1927, the maximum discharge of the White and Arkansas Rivers past the latitude of Arkansas City was considerably in excess of 1,712,000 cubic feet per second. (House Document No. 798, p. 110, table No. 14.) Therefore, if the discharge of the White and Arkansas Rivers in 1937 in conjunction with the flood from the upper Mississippi River at the mouth of the Arkansas River had been the same as it was in 1927, the water would have been  $14\frac{1}{2}$  feet over the top of the fuse plug levee gauge of 60.5. This would  
 340 have made 21 additional feet of water, so that the fuse plug levee would have had to be at a gauge of 74 feet, without any freeboard, to pass such a flood. With the customary freeboard, in order for the fuse plug levee to have safely carried such a flood, it must have been  $17\frac{1}{2}$  to  $18\frac{1}{2}$  feet higher than it now is.

If 528,000 cubic second-feet of water had come out of the Arkansas and White Rivers to join the 1937 flood crest it would have increased the gauge along the fuse plug levee 10.1 feet, calculating 52,000 cubic second-feet for each foot of gauge. This would have been approximately 5 feet over the top of the present fuse plug levee; and if this had not been diverted through the Boeuf Floodway it would have overflowed the whole alluvial valley of the Mississippi River below the mouth of the Arkansas River.

By comparing the discharge of the river at Arkansas City for similar gauges in 1927, when there was no cut-off and in 1935, when Leland cut-off was operating 35 miles below, I observe that the cut-off had no substantial effect at Arkansas City, 35 miles upstream. The nearest cut-off to the present head of the fuse plug levee at Yancopin is Ashbrook cut-off, which is approximately 65 miles downstream.

#### Cross-Examination.

My conclusions are based upon a study of the gauge readings and discharge records, and such conditions regularly published by the Mississippi River Commission, the public records and my own experience.

#### Redirect Examination.

The fluctuation in the flood plane at Arkansas City of  $4\frac{1}{2}$  feet in 1936, and less than 2 feet in 1937, may be unusual, but is not of a sufficient degree to justify the conclusion that the cut-offs have established a permanent condition on the river. Such fluctuation is often experienced in the record before there were any cut-offs. In the past the river has itself so constantly changed its own conditions as to make such variations, and changes in discharge capacities, normal in

341 studying any series of floods from year to year. The very purpose of the establishment of the Boeuf Floodway was to eliminate the necessity of raising the levees high enough to carry a combination of the 1937 flood out of the upper Mississippi and a 1927 flood out of the Arkansas and White Rivers. That is the understanding I have of the plan.

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S. L. WONSON, in rebuttal for plaintiff, testified:

I am familiar in a general way with the series of cut-offs that have been placed in the main channel of the Mississippi River below the mouth of the Arkansas River, and as an engineer have studied the probable effect of these cut-offs in relation to the flood control program of the Mississippi River as authorized by the Jadwin Plan, and later as connected with

the so-called Markham Plan. These cut-offs are not included in those plans. These cut-offs certainly will not reduce the flood hazard. I am inclined to believe they will tend to increase the flood hazard.

The Mississippi River, like all alluvial streams, constantly writhes like a serpent, twisting and changing its alignment with the natural forces that act upon it. In past years natural forces created a great many cut-offs. From 1765 to 1882, we have a record of 19 cut-offs that occurred, 2 of which were artificial, shortening the normal river channel by these cut-offs some 228 miles. Nevertheless, in 1929, the channel of the river was only 2 miles shorter between Cairo and Baton Rouge than it was in 1765. Acting under the influence of natural forces the river had restored its cut-off length. Artificial cut-offs do not repeal the laws of nature. The river will inevitably tend to restore its length. The river will prevail over all of man's opposition to its natural regimen. The adopted plan of flood control very wisely recognizes that specific principle. We must work with the river and not against it.

342 I have heard all of the testimony of the defendant's engineering witnesses and have examined all of their series of exhibits. I have discovered nothing in that testimony, so far as the facts involved are concerned, to cause any change in my first testimony in this case relative to the flood menace of plaintiff's property. The 1937 flood discharge at Arkansas City was a normal discharge due to well known causes and abnormal conditions. I cannot get excited about that. Even back in the dark days of 1912 and 1913, when the levees were 3 or 4 feet lower than the 1914 grade, there went by the levees at Arkansas City more than 1,000,000 cubic second-feet of discharge.

Only the 1937 flood has come down the river since these cut-offs have been made. No dependable conclusion as to the ultimate effects of these cut-offs can be reached based only upon that one 1937 flood. Already certain tendencies of channel deterioration have developed. Judging from past experience, it might require from 25 to 50 years to determine the ultimate effect of these cut-offs.

The effect of these cut-offs is local, as well as temporary. The Mississippi River is a drainage trough. We know that water flows downhill. The more downhill there is the faster the water flows and the greater the quantity. If we cut out a part of that trough and put in a special slope, like a cut-off, in that location we have the effect of rapids in a river. More

water goes, and goes faster. But below that section, there is a limit to the capacity of the trough. The water will, of course, pile up in that lower section.

The channel of the river is below bank-full stage. After the water rises over the banks, then the flood channel is defined by the levees, creating the entire flood channel between the levees. When the water flows over the banks, the effects of the cut-offs become progressively less as the water rises. The normal channel may be shortened by cut-offs, but they do not in any degree shorten the flood channel as defined  
343 by the levees.

As to the claim that the local property owners could raise the fuse plug levee above the 1914 grade, from an engineering standpoint the maintenance of the fuse plug levee at the 1914 grade and section is definitely and specifically an essential and vital feature of the plan adopted by the Flood Control Act of May 15, 1928. If this fuse plug should be raised by any authority, one of the essential, vital features of the Jadwin Plan would be cancelled. We would be back under the previous condition and history where, when river floods come down the river, the levee would break here one year and there another. All of the area now protected would be more or less under the same hazard. The flood control plan of June 15, 1936, the Overton Bill adopting the Markham Plan, does not take into account any increase of channel capacity of the river obtained by these cut-offs, but rather looks upon cut-offs, with indulgent eyes, as the eccentricities of some enthusiast.

#### Cross-Examination.

My testimony is based upon a study of all of the plans, and I have been listening to the testimony of the Chief of Engineers of the United States, and his immediate associates. I have studied the records of the Mississippi River Commission. I have never personally made any cut-off in the Mississippi River. I have gone on a steamboat through several of them. My information is scientific and not legendary. The reason I think the cut-offs might have a tendency to increase the flood hazards to the particular locality of plaintiff's property is because they upset the natural regimen of the river, and make its behavior more problematical.

If we are to control the Mississippi River we must work to some extent in line with its natural tendencies, rather than against them. The levee system has been a failure since the start because the levees work against the natural tendency of the river. The present engineering principle of flood con-



344 trol is a distinct advance in this respect in that it has recognized the desirability of providing some other arrangements besides levees only. It provides for the diversion of water out of the main channel that the levees cannot carry. In House Document 90, the Chief of Engineers of the United States himself declares "man must not try to restrict the river too much in extreme floods. The river will break any plan which does this. It must have the room it needs to accord with its nature, and must have that room laterally."

I think there were two elements which caused more water to go down the river in 1937, at a lower stage at Arkansas City than previously. One was the temporary effect of the cut-offs, which had already disappeared somewhat from the previous year. The other was the low stage of the river below the mouth of the Arkansas and the White, an empty trough. No man can say in what proportion these two causes acted. The low Arkansas and White Rivers affected the gauge at Arkansas City.

I live in St. Louis. My duties are the general supervision of the engineering work of the Missouri Pacific Railroad Company.

#### Redirect Examination.

This cut-off program was a rather startling proposal with which engineers were not in accord, and for that reason it was a very interesting study. I have studied all of the official literature on the subject, giving preference to the articles of those that had responsible charge of the flood control of the Mississippi River, and the determination of policy, thinking they were best informed. I have studied these cut-offs, and their effects, as applied to the plaintiff's property in this suit. The flood control of the Mississippi River is one of the greatest engineering problems of modern times. A man going out on the river and looking at what he can see with his physical eye, or what he can measure with a current meter, has no more insight of the problem, or of the things that enter into the solution of the problem, than an instrument in a great war has of the strategy and tactics of the commander-in-chief.

345 P. T. SIMONS, in rebuttal for plaintiff, testified:

I have followed the defendant's testimony in this case and have seen the various exhibits offered. No evidence as to the effect of cut-offs in the river would cause any change in my former testimony in this case. In my judgment, the

cut-offs neither have had, nor will have, any effect on the flood hazards of plaintiff's property. No effects have been indicated that would prevent the overtopping of the fuse plug levee.

The history of cut-offs indicates that the effects of cut-offs are temporary and local. As the flood stage passes over the bank-full stage in the channel of the river and approaches the top of the levee line, there is a progressive decrease in the effect of the cut-offs.

I have been familiar with the middle section of the Mississippi River for 20 years. In 1935, the United States Government constructed about  $2\frac{1}{2}$  miles of revetment at Yellow Bend, just below Arkansas City, at a cost of \$500,000, to prevent further bank caving and erosion at that point. Ashbrook cut-off was put in immediately below downstream from this revetment. I inspected that point the day before this trial began. The 1937 flood destroyed the effectiveness of that \$500,000 of revetment work, caused by the Ashbrook cut-off increasing the velocity along this revetment.

#### Cross-Examination.

Bank caving began at Yellow Bend as early as 1912. The revetment work was completed in 1935. I examined the condition of the revetment after the 1937 flood by walking over it and looking at it, as an engineer does. I did not see its condition under the water. In my study of these cut-offs I have studied the reports of all branches of the War Department upon the Mississippi River, including the hydraulic laboratory at Vicksburg, and the annual reports of the Chief of Engineers, and the special reports to Congress. Since 1927, approximately one-half of the total time in my work has been a study of the Mississippi River flood control problem, principally as it affects the Missouri Pacific railroad properties.

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#### Redirect Examination.

If the diversion from the main channel of the Mississippi River should be moved downstream from the Boeuf Floodway entrance it would destroy the relief to the levees on the south bank of the Arkansas River from Pine Bluff to Yancopin.

HUGH R. CARTER, on behalf of plaintiff, testified:

I have lived in Arkansas for 50 years, all of my life. Since my graduation from the University of Arkansas in 1907, I have practiced my profession as a civil engineer. I was State Highway Engineer for the State of Arkansas for 6 years. My engineering experience has covered levees and drainage. I have had occasion to familiarize myself with the flood control plan of the Mississippi River, commonly called the Jadwin Plan, as adopted by the Flood Control Act of May 15, 1928.

I have had occasion to consider the cut-offs which have been put into the channel of the Mississippi River below the mouth of the Arkansas River. I do not think these cut-offs will be beneficial, or have any appreciable effect, on the flood hazard of plaintiff's property in the future. This conclusion is based upon experience and the study of all available records of previous floods in connection with the 1937 flood since these cut-offs have been made. Without a highly organized and extremely expensive maintenance program and stabilization structures the effects of these cut-offs will be temporary. From the record of past floods I would say that the effect of these cut-offs indicate that they are local. As the flood stage increases above the bank-full stage of the river, the efficiency of the cut-offs is reduced. The flood channel of the Mississippi River is from levee to levee. Only with the gauge of the Mississippi River levees 60.5 on the fuse plug levee is there danger of the fuse plug levee being overtopped and thus menacing the plaintiff's property. At that stage, I do not think the cut-offs will decrease the flood hazard at all.

347 I do not think the 1937 flood is a proper test of the efficiency of the cut-offs. The storage basin, beginning at the mouths of the Arkansas and White Rivers, was extremely low, which prevented a very fast run-off into the main channel of the river. Had there been water in the Arkansas and White Rivers in 1937, comparable to 1927, the fuse plug levee could not have safely carried the combination of the two floods past the fuse plug levee without the diversion into the Boeuf Floodway as planned. The volume of water of any particular flood at any particular point has not been reduced a single cubic second foot by reason of these cut-offs in the middle section of the Mississippi River.

The increased velocity caused by the cut-offs, when located near the levee line, increases the hazard by endangering the levee line. I think that when Caulk's Neck cut-off above Arkansas City, is in operative condition, it will materially in-

### Cross-Examination.

In 1908, I was engaged in designing and building about 60 miles of levee system on the Red River. I have done some reconstruction work on levee lines of the Arkansas River, not involving large amounts. In my general practice I have handled several drainage districts, and other matters affecting hydraulics.

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ARTHUR E. HEAGLER, in rebuttal for plaintiff, testified:

I have lived in Arkansas 33 years and am practicing civil engineering. For the past 23 years the greater portion of my work as an engineer has been on levees, drainage and flood protection work. I was employed by the United States Department of the Interior for the past two years. I was employed by the Federal Land Bank of St. Louis to make drainage and flood investigations in Arkansas, Missouri and Illinois, and investigated the area in Southeast Arkansas  
348 covered by the Boeuf Floodway created by the Flood Control Act of May 15, 1928. I reported my findings to the Federal Land Bank of St. Louis.

I have given my attention to the testimony introduced by the defendant's engineer witnesses in this case relative to cut-offs. As an engineer I have constructed cut-offs myself on various streams smaller than the Mississippi River. I know that when the soil is not sufficiently stable serious deterioration occurs in the channel below the cut-offs.

From the discharge rating curve graph of the Mississippi River discharges, introduced by the defendant, I have calculated mathematically the quantity of flow in a discharge, expressed in cubic feet per second, necessary to raise the gauge height in the vicinity of Arkansas City one foot. In the upper stages of the 1937 flood a volume of 52,000 cubic feet per second of water raised the gauge at Arkansas City one foot. Accepting the Government's exhibit as true, for approximately every 50,000 cubic second-feet of additional water emptied out of the White and Arkansas Rivers into the 1937 flood crest, the gauge at Arkansas City would have risen one foot.

I do not think that these cut-offs in the channel of the Mississippi River have done away with the flood hazards to plaintiff's property created by the placing of plaintiff's property in the Boeuf Floodway by the Flood Control Act of May 15, 1928. The effects of the cut-offs are local and temporary. There has been a serious deterioration in the river below Arkansas City. This is shown by the Government's rating curve



channel between the rising and falling stream. On January 27, 1937, as the river was rising, at a gauge of 48.01 feet the river was discharging 1,602,000 cubic feet per second, while in the same flood, with a 6 foot higher stage, on March 1st, the river was discharging only 604,000 cubic feet per second.

That much difference in the discharge capacity of the 349 river during the 1937 flood indicates that something was happening in the river below where this measurement was made. An unstable condition was taking place. A shoaling or deterioration of the channel developed there, a silting up with sediment brought down from erosion of the banks upstream. When water comes through the cut-offs and reaches the floor of the river below it causes silt to deposit. On May 9, 1937, I visited Yellow Bend and could see that a decided amount of erosion and caving of the banks was taking place on both sides of the river there. A great deal of the revetment at Yellow Bend was destroyed by the 1937 water.

Cut-offs in smaller channels of small streams that have good heavy clay that can resist erosion would be satisfactory. We built cut-offs where our velocities did not exceed 3 or 4 feet per second in that type of stream, that is about the limit of where cut-offs are satisfactory. My only experience with flood control was with the St. Francis Levee Board and in the flood of 1916. I have had considerable experience in discharge observations over this State, and on the Big and Sunflower Rivers in Mississippi. I have never worked for the Mississippi River Commission. From my experience it is reasonable to believe that it would be impossible to hold a series of these cut-offs without a large amount of revetments and pavement of some sort; and I seriously doubt that these revetments placed in channels where they receive the velocity that they did in the recent flood, can be held. When the cut-off is first blown in it is narrow and water velocity becomes high. As time passes, it deepens in the channel and widens from bank to bank. The upper cut-off has a tendency to develop while the lower cut-off would not be as efficient for a few years because of the deterioration in the channel that would naturally take place. They would have to keep dredging out the accumulation of sand and silt. I do not believe the Government will continually spend the money necessary to maintain all these cut-offs. I do not know the plan of the Mississippi River Commission for the maintenance of these cut-offs. In 350 my opinion these cut-offs will not do the job.

#### Redirect Examination.

The Mr. Pharr under whom I did flood control work in 1916 for the St. Francis Levee District is now a member of the Mississippi River Commission.

Plaintiff moved the Court to strike from the record all the testimony introduced relative to the cut-offs which were developed after the filing of plaintiff's suit. Motion overruled and plaintiff's exceptions saved.

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Plaintiff moved to strike from the record all that part of the testimony dealing with the modifications of the flood control plan authorized, under certain conditions, by the Act of June 15, 1936, the Markham Plan. Motion overruled and plaintiff saved exceptions.

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Mr. Dyott: In addition to counsel's motion I would like to move to delete the record and strike from the record as evidenciary matter all exhibits and testimony as to public documents to which counsel has referred and which appear in the record as evidenciary matter. For the reason that they may be received upon the same determination and same authority and in the same way the court has just received the last document.

The Court: Well, I don't understand they have ever been received as evidence, Mr. Dyott, but I see no objection to sustaining your motion if that will relieve the situation to any extent. I don't see that you need it, but your motion will be sustained, and we understand it that way. These documents are not evidence in the case.

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351 GEORGE CLEMENS, recalled by defendant in sur-rebuttal, testified:

We have been able to determine by our studies in comparing the 1937 flood with other floods that the lowering which has been accomplished by the cut-off system is not local, but continues throughout the entire stretch of the river from Arkansas City to below Vicksburg.

I am unable to make or draw any conclusion from the diagram introduced by Mr. Neptune as Exhibit 76. The diagram does not present a proper comparison of the various effects of the various years shown. In preparing the diagram no account has been taken of the variations in stream flow which existed at the time on the various points.

The rating curve graph which we introduced indicates a loop, but rating graphs normally have a loop of various sizes, and I would not say that the rating graph is evidence of permanent deterioration of the channel. We have made frequent

surveys of the entire river and have not yet discovered any great evidence of channel deterioration.

We have found a definite lowering of the flood profile. Dredging is an integral part of the entire stabilization program.

The peak flow of the 1927 flood was 20% greater than the 1929 flow, but passed Grenville at a foot and a half lower stage.

From our studies of the river channel and from our surveys of the entire river we have made surveys of the same section as often as every two weeks, others once a year, others at more infrequent intervals, and we have discovered as yet no great evidence of channel deterioration. Further evidence of that, and I believe this last is the best evidence, is in the consideration of the river slope. By studying the slopes we find that we have maintained satisfactory slopes throughout the reach and I have found no concrete evidence of deterioration, but we have found definite lowering of the flood profile.

According to our observation of the other recent cut-offs, Caulk's Neck cut-off will not transfer the danger point down the river to an ordinary stage of rise at Arkansas City.  
352 That is an old theory that was believed for some time, and was perhaps one of the factors that was effective in keeping river commissions and river engineers from embarking on a cut-off program.

The program includes cut-offs as one of the items. It is a program of channel enlargement, channel improvement. We hope to dispose of the water in a more expeditious manner and the results have been most gratifying in accomplishing this purpose. The cut-offs by themselves are merely one link in the chain. The dredging is not governed by the cut-offs but is an integral part of the entire system. I can speak particularly on that because the dredging is specifically my duty to follow up. The dredging was not an indication of channel deterioration but is done to assist in completing the stabilization program. It is true that we dredge in certain localities to improve navigation but the major part of the dredging activity is to stabilize the channel and improve the channel as a part of this comprehensive program. It is one program, dredging and cut-offs.

Shortening the river channel 100 miles by cut-offs has a very material effect upon the flood channel of the river. The major portion of effective flow actually flows within the channel of the river at a much greater velocity than the velocities

that must pass through this channel is permitted to flow through a shorter channel we have effectively shortened the flood channel.

I have been unable to find any basis for the statement that the stages at Greenville showed an increase in height. The statement was made but the facts presented showed that Greenville was actually lower in 1937 than it was in 1929 in spite of the fact that the 1937 flow was approximately the same amount there as it was at Arkansas City. That is, the flood passed Greenville at a stage, as I recall the testimony, it was a foot and a half lower but the peak flow was 20% greater.

353 The 1937 flood would have crevassed the fuse-plug levee if we had not had the cut-offs. No other flood since 1927, has been high enough to crevasse the fuse plug levee. The 1937 flood, largely from the Ohio River, was large enough to have crevassed the fuse plug levee.

The shortening of the river one hundred miles by the cut-offs has very materially effected the flood channel of the river. The flood channel is that following the central line of the levee system.

To determine the effect of cut-offs and carry on the general program of channel improvement requires continuous and comprehensive observations and study, with a vast amount of detail data. I would like to say that conclusions reached from the old records and old readings are exactly the type of conclusions I would expect engineers to reach from a study of the past observations and analyses of various opinions we have in the past record. They do not have the complete information that has recently become available to us. It is impossible to publish everything we have. It is probably true that cut-offs, if created as nature has created them in the past, if left alone without dredging and maintenance and upkeep and care and control would probably not be effective for a long period of time. Caulk's Neck cut-off will add to the efficiency of the other cut-offs.

The maintenance of the cut-offs and dredging is distinctly a part of the program in connection with the maintenance and upkeep. We have a number of dredges in each district that are continually working on this general program of channel improvement and their efficiency has been steadily increasing.



GERARD H. MATTHES, recalled for defendant in sur-rebuttal, testified:

It has always been found when making cut-offs incorrectly that a piling up of the water results below them. In our work down on the Mississippi River the only time we have ever noticed the slightest piling up of water below is when the cut-off is first opened.

The principles that have been employed in this work which we have discussed in this case relating to channel stabilization are novel. They are novel to the extent that no description of them, or of the hydraulic principles which were employed, have ever appeared anywhere in print. I speak advisedly because I am concerned with making that subject public when the time comes, when I am permitted to do so. Up to the present time none of the engineers witnesses for the plaintiff who have testified here have been in position to discover, or to find out, either by study or by inquiry, just what are the hydraulic principles employed. It has not been made public. Therefore, they have not been in position to size this matter up from a correct point of view. I am frank to say that I am not at all in disagreement with the statements which these engineers, especially those experienced with the cut-off work, have made, because from their point of view, and under the conditions which they described, they were probably entirely correct. Those conditions are not applicable to what we are doing on the Mississippi River today. As I said, the work is being done in a novel manner; and I do not see how it is possible for any engineers, outside of those immediately connected with it to be in a position to judge whether it is being done right or wrong.

Dredging is one of the important features of our channel stabilization program. Cut-offs alone do not improve a river. It has not been maintained by me, or any of the engineers testifying for the defendant, that cut-offs alone would improve this river, or lower the water surface, or stabilize the channel. On the contrary, cut-offs are only a step in the program and in order to secure a stabilized channel it is necessary to follow that up with the maintenance of very effective and intelligent dredging work.

Here the defendant rested.

The following stipulation was filed:

(Stipulation Relating to Facts.)

In The United States District Court, Eastern Division Of  
Arkansas, Western Division.

Mrs. Julia Caroline Sponenbarger, Plaintiff,

No. 7984. vs.

The United States of America, Defendant.

This stipulation is for the purpose only of this action and is filed with the understanding that it is not to be binding upon any party in any other action which is now pending or which may be hereafter instituted.

It is stipulated and agreed that various records show the following facts pertaining to the Cypress Creek Drainage District and the Southeast Arkansas Levee District:

356 A. H. Rowell and W. R. Humphrey were appointed receivers for Cypress Creek Drainage District by this Court on January 15, 1930; that they were in charge of the said district until April 9, 1937, on which date they were discharged as such receivers by the order of this Court and the affairs of the district and its management were on said date again placed with the Commissioners of the district.

Grady Miller was appointed receiver of the Southeast Arkansas Levee District by an order of this Court on February 5, 1932. He has been continuously in charge of the affairs of said district from and since said date and is now in charge thereof as such receiver.

Special benefit assessment taxes constituting a first lien have been levied against the property involved in this action by and in favor of the Cypress Creek Drainage District in the sum of \$800.00. There has been paid of said assessment the sum of \$480.00. There is now outstanding and unpaid of said assessed benefits the sum of \$320.00 not yet due but against which taxes will be levied annually by the said district.

The land involved in this action is also subject to an annual improvement tax of thirty cents per acre levied by the Legislature of Arkansas in favor of the Southeast Arkansas Levee District, which tax, along with a similar one which was levied against all the other lands in the district, was levied for the purpose of making improvements costing in excess of \$3,000,000.00. There is now outstanding and unpaid bonds of said district and of its predecessors, the payment of the lat-

ter having been assumed by the said district, of an aggregate amount of \$2,957,500.00.

# I.

## Bond Issue of The Cypress Creek Drainage District Dated February 1, 1916

St. Louis Union Trust Company, Trustee.

The Cypress Creek Drainage District issued and sold on February 1, 1916, bonds in the aggregate principal amount of \$700,000.00 maturing serially on the first day of August of each year from 1922 until 1946, inclusive, bearing interest at the rate of 5½% per annum.

357 There remains outstanding and unpaid of said indebtedness, bonds in the principal amount of \$650,000.00 and the interest thereon from the 1st day of August, 1929.

That to secure the payment of said bonds, the said district on February 1, 1916, executed a written mortgage and pledge to the St. Louis Union Trust Company, a Missouri corporation, by which it conveyed to said company, as trustee, the properties and revenues of the district, including all uncollected assessments levied by the district on the real property, railroads and tramroads therein, together with all assessments which might thereafter be levied on said property. That said bonds and said mortgage and pledge are a first lien against the said assets. The St. Louis Union Trust Company owns a number of said bonds of the par value of \$167,500.00.

# II.

## Bond Issue Of Cypress Creek Drainage District Issued April 1, 1921

Franklin-American Trust Company, Trustee.

Said District issued and sold on April 1, 1921, bonds in the aggregate principal amount of \$500,000.00 maturing serially on the first day of April in each of the years from 1922 to 1946, inclusive, bearing interest at the rate of 6% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal amount of \$449,000.00 with six months' interest thereon for the last half of the year 1927 and all of the interest thereon from and since February 1, 1929. That to secure the payment of said bonds the said district on April 1, 1922, executed a written mortgage and pledge to the American Trust Company, now the Franklin-American Trust Company, a Missouri corporation, by

which it conveyed to said company, as Trustee, the said properties and revenues of the district, including all uncollected assessments levied by the district on the real property, railroads and tramroads, together with all assessments which might thereafter be levied on said property. That said mortgage and said bonds and pledge are a second lien against the said assets.

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## III.

## Bond Issue Of Cypress Creek Drainage District

Issued April 1, 1922

Franklin-American Trust Company, Trustee.

Said district issued and sold, on April 1, 1922, bonds in the aggregate principal amount of \$300,000.00, maturing serially on the first day of September in each of the years from 1927 to 1946, inclusive, all of which bonds are now outstanding with six months' interest thereon for the last half of the year 1927 and all of the interest thereon from and since February 1, 1929. That to secure the payment of said bonds the said district, on April 1, 1922, executed a written mortgage and pledge to the American Trust Company, now the Franklin-American Trust Company, a Missouri corporation, by which it conveyed to said company, as Trustee, the said properties and revenues of the district, including all uncollected assessments levied by the district on the real property, railroads and tramroads, together with all assessments which might thereafter be levied on said property. That said mortgage and said bonds and pledge are a second lien against the said assets.

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## IV.

## Bonds of the Southeast Arkansas Levee District

Dated January 1, 1916.

St. Louis Union Trust Company, Trustee.

The Southeast Arkansas Levee District issued and sold on January 1, 1916, bonds in the sum of \$600,000.00, payable serially on July 1st of each year from July 1, 1923, to July 1, 1937, inclusive, bearing interest at the rate of 6% per annum. There remains outstanding and unpaid of said indebtedness of said district \$342,000.00 and the interest thereon from July 1, 1932. The St. Louis Union Trust Company owns a number of said bonds of the par value of \$118,500.00. To secure the payment of said bonds, the said district, on January 1, 1918, executed a written mortgage and pledge to the St. Louis Union Trust Company, a Missouri corporation, by



which it conveyed to said company, as trustee, the property and revenues of the District including all uncollected assessments levied by the said district on the real property, railroads and tramroads, together with all assessments that might thereafter be levied on said property. That said bonds and said mortgage and pledge are a first lien against the said assets.

## V.

**Bond Issue of Red Fork Levee District Dated August 1, 1915**  
**St. Louis Union Trust Company, Trustee**

The Red Fork Levee District issued and sold on August 1, 1915, bonds in the sum of \$100,000.00 payable serially on August 1st of each year from August 1, 1916 to August 1, 1936, inclusive, bearing interest at the rate of 6% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal sum of \$30,500.00 and the interest thereon from July 1, 1932.

To secure the payment of said bonds the said district, on August 1, 1915, executed a written mortgage and pledge to the St. Louis Union Trust Company, a Missouri corporation, by which it conveyed to said company, as Trustee, the property and revenues of the district including all uncollected assessments levied by the said district on the real property, railroads and tramroads, together with all assessments that might thereafter be levied on said property.

Said Red Fork Levee District was merged into the Southeast Arkansas Levee District by the Legislature of Arkansas in 1917. That said bonds and the said mortgage and pledge are a first lien against the assets of the Southeast Arkansas Levee District.

## VI.

**Bond Issue of the Southeast Arkansas Levee District**  
**Dated October 1, 1919**

**Mercantile-Commerce Bank & Trust Company, Trustee**

The Southeast Arkansas Levee District issued and sold on October 1, 1919, bonds in excess of \$500,000.00, bearing interest at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal amount of \$490,000.00 with the interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile Commerce Bank and

Trust Company is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the uncollected assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the said mortgage and pledge are a first lien against the said assets.

## VII.

### Bond Issue of the Southeast Arkansas Levee District

Dated March 1, 1921

Mercantile-Commerce Bank and Trust Company, Trustee

The Southeast Arkansas Levee District issued and sold on March 1, 1921, bonds in excess of \$400,000.00, bearing interest at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal amount of \$400,000.00 with interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile Commerce Bank and Trust Company is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the uncollected assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the mortgage and pledge are a first lien against the said assets.

## VIII.

### Bond Issue of the Southeast Arkansas Levee District

Dated March 1, 1923

Mercantile Commerce National Bank

The Southeast Arkansas Levee District issued and sold on March 1, 1923, bonds in excess of \$300,000.00, bearing interest at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness, bonds in the principal amount of \$285,000.00 with interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile Commerce National Bank is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the said mortgage and pledge are a first lien against the said assets.

## IX.

## Bond Issue of the Southeast Arkansas Levee District

Dated November 1, 1924

Mercantile-Commerce National Bank, Trustee

The Southeast Arkansas Levee District issued and sold on November 1, 1924, bonds in excess of \$282,000.00 bearing interest at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal amount of \$282,000.00, with interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile-Commerce National Bank is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the said mortgage and pledge are a first lien against the said assets.

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## X.

## Bond Issue of the Southeast Arkansas Levee District

Dated March 1, 1926

Mercantile-Commerce Bank and Trust Company, Trustee

The Southeast Arkansas Levee District issued and sold on March 1, 1926, bonds in excess of \$100,000.00 bearing interest at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal sum of \$100,000.00 with interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile-Commerce Bank and Trust Company is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the said mortgage and pledge are a first lien against the said assets.

## XI.

## Bond Issue of the Southeast Arkansas Levee District

Dated January 1, 1927

Mercantile-Commerce Bank and Trust Company, Trustee

The Southeast Arkansas Levee District issued and sold on January 1, 1927, bonds in excess of \$334,000.00 bearing inter-

este at the rate of 5% per annum. There remains outstanding and unpaid of said indebtedness bonds in the principal sum of \$334,000.00 with interest thereon from March 1, 1932. Said bond issue is secured by a written mortgage and pledge in which the Mercantile-Commerce Bank and Trust Company is trustee. The said mortgage and pledge conveys to said trustee the properties and revenues of the district including the assessments on the real property, railroads and tramroads therein, together with all assessments that might thereafter be levied. The said bonds, the said mortgage and pledge are a first lien against the said assets.

**E. E. HOPSON, and  
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Attorneys for Plaintiff

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merce Bank and Trust Company and  
the Mercantile-Commerce National  
Bank.

**DeWITT POE, and  
LAMAR WILLIAMSON**  
Attorneys for Cypress Creek Drain-  
age District

**JOE W. HOUSE**  
Attorneys for the Receiver of the  
Southeast Arkansas Levee District



The following Stipulation was filed March 2, 1937:

**Stipulation Anent Evidence**

In the United States District Court, Eastern District of  
Arkansas Western Division

Mrs. Julia Caroline Sponenbarger, Petitioner,  
No. 7984 vs.

The United States of America, Defendant.

The respective parties hereby stipulate and agree to waive the necessity of a technical authentication of any public document, or part thereof, which either party may desire to offer in evidence. That is to say, all public documents bearing the print of the Government Printing Office may be taken as official without the necessity of formal certification by the Department involved. That any facts established by legal records may be testified to by a party who has made examination of these legal records without the necessity of bringing such legal records or the keeper of same into Court. By "legal records", it is meant those records kept in the counties which show the records of deeds, mortgages and/or  
364 leases upon real estate.

It is expressly understood that while the rule of "best evidence" is hereby waived to the extent stated, and no question will be raised as to the method of introducing public records, each party does expressly save the right to object to the relevancy and materiality of the evidence so offered.

Submitted for filing in the above styled case as a part of the records thereof.

MRS. JULIA CAROLINE  
SPONENBARGER, Petitioner,  
By Lamar Williamson,  
Her Attorney.

UNITED STATES OF  
AMERICA, Defendant,  
By Fred A. Isgrig,  
United States District Attorney,  
for Defendant.

365 Whereupon, the plaintiff requested the Court, separately and severally, separately presenting each subdivision of each paragraph, to make the following:

(Findings of Fact Requested by Plaintiff.)

**Findings of Fact:**

1. The plaintiff, Mrs. Julia Caroline Sponenbarger, is a citizen of the State of Arkansas, and was such during all

times involved in this litigation. She is the owner of the lands and the claim set forth in her petition filed in this Court on August 11, 1934; and has made no assignment or transfer of her said claim, or of any part thereof, or interest therein, except as stated in her petition. The claimant has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted or given encouragement to rebellion against the said Government. (See Title 28 U. S. C. A., Sec. 265, p. 91).

No member of the Congress has any interest or share of any kind or character in the petitioner's claim or cause of action, nor will any member of the Congress be benefitted in any way by any judgment rendered in this cause.

The plaintiff has complied with all the legal requirements necessary to maintain this suit against the defendant, the United States of America.

2. Plaintiff's petition is in fact a suit of a civil nature; and constitutes a claim founded upon the Constitution of the United States, Fifth Amendment; and upon an Act of Congress (being Public No. 391, 70th Congress; 45 Stat. 534, et seq.; 33 U. S. C. A., 702a to 702m, inclusive), being an Act entitled: "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes"; and is founded upon an implied contract of the Government of the United States to pay for damages in a case not sounding in tort; and also involves the title of, and damage  
366 to, real and personal property situated in Desha County in the State of Arkansas. (See Title 28 U. S. C. A. Sec. 41 (20), p. 625). The amount of petitioner's claim, exclusive of interest and costs, is less than \$10,000; and is, in fact, within the jurisdiction of this Court.

3. By the passage of the Flood Control Act of May 15, 1928, the United States adopted, and authorized to be prosecuted, a comprehensive plan for the flood control of the Mississippi River in its alluvial valley in accordance with the engineering plan set forth and recommended by the Chief of Engineers in a report dated December 1, 1927, printed in House Document numbered 90, 70th Congress, first session. The project as a whole constitutes one, entire, complete, comprehensive plan.

4. In the passage of said Flood Control Act of May 15, 1928, the United States for the first time assumed national responsibility for flood control on the main stem of the Mississippi River in its alluvial valley between Cape Girardeau,

Missouri, and the Head of Passes near the delta or mouth of the river.

5. The adopted project (commonly called the Jadwin Plan" in honor of Maj. Gen. Edgar Jadwin, then Chief of Engineers, the author of the plan), differed fundamentally from all engineering plans theretofore sponsored by the Government in that the Jadwin Plan was designed to limit the amount of flood water carried in the main river to its safe capacity and to send the surplus water through lateral floodways designed to relieve the main channel of the water it cannot carry and lower the floods to stages at which the levees can carry them.

6. The confinement of the Mississippi River within levees, and the great development of drainage systems prior to May 15, 1928, had raised flood stages materially and this raising had exceeded estimates made in the past. Had it been attempted to hold the water within the levee lines existing when the 1928 Act was passed by raising such levees, predicted river stages were possible 14 feet above the then levee grade at Arkansas City, a short distance below the mouth of the Arkansas River. The Government adopted as a practical means to meet this situation a plan designed to spill the water out of the main leveed channel at selected points when flood stages reach the danger point. (Doc. 90, Sec. 96).

7. Because of the large discharge from the White and Arkansas Rivers, the section of the Mississippi River from Arkansas River to Red River is probably the most critical from the viewpoint of flood control. This stretch of the river is called the "Middle Section". The high stages resulting from the combination of floods from the Mississippi, Arkansas and White Rivers make it impractical to completely confine major floods between levees in this section of the river. Any plan for controlling major floods in this section of the river must include two principal elements, namely, discharge by the main river leveed channel with levees at substantially the grade and section authorized by the Flood Control Act of May 15, 1928, and escape of excess water by a route west of the river. (Com. Doc. No. 1, Sec. 17).

8. The Jadwin Plan was based upon the finding of fact that from the mouth of the Arkansas River to the mouth of the Red River extreme floods cannot be carried between levees of the Mississippi River without dangerous increase in their heights. A floodway for excess floods was therefore provided down the Boeuf River on the west side of the Mis-

Mississippi River, below the mouth of the Arkansas River. The entrance to this floodway was closed by a safety plug section of the levee at its existing grade, located at Cypress Creek near the mouth of the Arkansas River. To insure their safety until this fuse plug section of levee opens, the other levees of the Mississippi River from the Arkansas River to the Red River were raised about 3 feet; and to prevent flood waters from entering the basin except into the floodway during high floods the levees on the south side of the Arkansas River were strengthened and raised about 3 feet as far upstream as necessary. (Doc. 90, Sec. 16).

9. The Arkansas and White Rivers, emptying into the Mississippi River just above Arkansas City, Arkansas, have been known to have a combined simultaneous discharge of approximately 1,200,000 cubic feet per second, as in the 1927 flood. Under 1928 flow conditions the resultant flow, obtained by adding the probable contribution of the White and Arkansas Rivers to the assumed flood arriving from Cairo, if confined by the raising of levees on their existent locations, would produce a stage of about 74½ feet at Arkansas City. To confine the river at such a stage the levees would have had to be raised about 14 feet. Since they were already more than 25 feet high in places, this was deemed impracticable and the alternative course was selected of providing for the escape of such waters as could not be carried in the main river between levees of reasonable height. It was decided that an increase of approximately 3 feet in existing levee heights below Arkansas City was about as much as was desirable. This limitation in the Jadwin Plan called for the escape during the maximum probable flood of about 1,000,000 cubic feet per second and the topography of the valley required that this escape be on the west side of the river. It was accordingly decided in the Jadwin Plan to raise main river levees about 3 feet; to provide for the escape of surplus flow by refraining from the enlargement, above its then existing grade, of a stretch of the west bank levee line at the head of the Boeuf Basin; and to limit the extent of overflow in the Boeuf Basin by confining the escaping waters between levees so located as to restrict overflow (as far as seemed practicable), to its lowest and least valuable lands. The portion of the river levees that was not to be raised has become known as the "Cypress Creek fuse plug". Its crest elevation is such that stages which exceed 60½ feet on the Arkansas City gage will overtop it. Data at the time indicated that under 1928 flow conditions stages in excess of 60½ feet at Arkansas City would occur not more often, on an



average, than once in 12 years. The amount of water escaping through this diversion would depend upon the size of the flood, reaching an estimated maximum of about 1,000,000 cubic feet per second in the so-called "superflood". The land in the Boeuf Basin that would be overflowed by the waters topping or crevassing the fuse plug levee is called the Boeuf Floodway. This floodway, comprising about 1,330,000 acres, 25 percent of which was estimated to be cleared land and 75 percent swamp and timber land, was designed to extend from the fuse plug levee to Sicily Island Gorge (on the Ouachita River at Harrisonburg, about 60 miles below Monroe, Louisiana). (Sec. 7, Com. Doc. No. 1, p. 18).

10. The Jadwin Plan as adopted by the Flood Control Act of May 15, 1928, recites: "The flood of 1927 rose to 60.5 on the Arkansas City gauge. It has been estimated that had it been confined and crevasses not occurred the gauge height would have been 69. The top of the present levee is 60.5. To take care of this flood with proper freeboard would require present levees to be raised about 12 feet. Such an increase in levee height would greatly intensify the disaster resulting from an accidental failure of a levee, besides being inordinately costly. Nor would they be safe, for it has been estimated that floods might come which would produce, if confined, stages of over 74 feet. It is obvious that no attempt should be made to raise levees to such a height. The practical remedy is to raise the levee grade 3 feet on both

370 sides of the Mississippi below the Arkansas River, to strengthen these levees so that they will not fail from causes other than accident or overtopping, and to preclude overtopping by insuring that the water in excess of the capacity of the leveed channel be spilled out near the mouth of the Arkansas " river. (Doc. 90, Sec. 117).

11. Said Jadwin Plan further provides: "To insure that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River bottom, where natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be inclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees.

It is unwise to attempt to limit the volume of flow that may possibly enter the floodway to a narrower floodway that might prove of insufficient capacity. A narrower floodway cleared of timber was considered, but the clearing was found to be unwarrantably expensive in first cost and maintenance for the increased efficiency of discharge produced thereby." (Doc. 90, Sec. 118).

12. Said Jadwin Plan further provides: "The Boeuf River bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land." (Sec. 119, Doc. 90).

13. Said Jadwin Plan, so adopted by the [Food] Control Act of May 15, 1928, further provides: "The United States must have control of the Cypress Creek levee and keep it substantially at its present strength and present height." (Sec. 120, Doc. 90).

14. Said Jadwin Plan further provides: "The remainder of the alluvial valley on each side of this stretch of the river, barring accident, will have complete protection from all possible floods." (Sec. 121, Doc. 90).

15. Said Jadwin Plan further provides: "Safety valves. In considering the plan for control of the Mississippi much study was given to providing a flexible feature such as safety-valve spillways over the levees to discharge water that might possibly come in excess of any predicted. The fuse-plug levees decided upon for the two lower sections of the river gave the flexibility desired and made unnecessary additional safety valves at this time." (Sec. 134, Doc. 90).

16. Section 9 of the Flood Control Act of May 15, 1928, was in accordance with the recommendation of Gen. Jadwin, Chief of Engineers, as follows:

"I further recommend that legislation be enacted:

"(a) Prohibiting any obstruction not affirmatively authorized by Congress to the flood discharge capacity of the alluvial valley of the Mississippi River below Cape Girardeau and providing that it shall not be lawful to build or commence the building of any levee or other structure in said alluvial valley, or in any floodway provided therein unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War." (Sec. 149, Doc. 90).

17. The special Board appointed pursuant to the provisions of Section 1 of the Flood Control Act of May 15, 1928, reported to the President of the United States under date of August 8, 1928, as follows: "The Board therefore recommends the adopted project submitted by the Chief of Engineers to the Secretary of War, dated December 1, 372 1927, and printed in House Document No. 90, Seventieth Congress, First Session." (Com. Doc. No. 28, 70th Congress, 2nd Session).

18. Under date of August 13, 1928, the President approved the general policy and method of the Jadwin Plan in the following language:

"The White House

"Washington.

August 13, 1928.

"The policy and method of dealing with the problem set out in the report, dated August 8, 1928, of the Board provided for in Section 1 of 'An act for the Control of Floods on the Mississippi River and its tributaries and for other Purposes', approved May 13, 1928, hereto annexed, are approved. The balance of the report is approved excepting and reserving for my future action those parts which contemplate the acquiring of rights in land for constructing spillways and floodways.

(Signed) CALVIN COOLIDGE."

(Com. Doc. No. 2, 71st Congress, 1st Session).

19. Under date of January 10, 1929, the President approved the Boeuf Floodway in the following language:

"The White House

"Washington.

January 10, 1929.

"Supplementing my approval of August 13, 1928, of the report of the Board provided for in Section 1 of 'An Act for the Control of Floods on the Mississippi River and its Tributaries, and for Other Purposes', approved May 15, 1928, which approval excepted and reserved for future action those parts of the report which contemplate the acquiring of rights in land for constructing spillways and floodways, the construction of the protection levees in the Boeuf Basin, as provided for in the adopted project, is approved.

373 "Land for rights of way for these levees will be secured by condemnation, as authorized by law, provided that these lands may be purchased, when they

can be thus secured at reasonable prices, which shall not in any case, exceed two and one-half times the assessed valuation at the present time.

(Signed) "CALVIN COOLIDGE."

(Com. Doc. No. 2, p. 12).

20. Therefore, on January 10, 1929, the project as set forth in House Document No. 90, Seventieth Congress, first session, as it applies to the Boeuf Floodway, became definite and fixed, with no power of modification or change, except as provided in the project itself, by any authority save the Congress. (Com. Doc. No. 2, pp. 13-16).

21. On July 1, 1929, the United States filed suit in the District Court of the United States for the Western Division of the Eastern District of Arkansas for condemnation for rights-of-way for the Guide Levee shown on the maps of the Jadwin Plan running from the general vicinity of Luna, in Chicot County, Arkansas, in a southerly direction, west of Lake Chicot, to the head of Maconridge north of Eudora, Arkansas, designed to close the upper entrance of Tensas Basin which lies between Macon ridge on the west and the Mississippi River on the east, in the States of Arkansas and Louisiana.

On the same date, said United States District Court issued an injunction prohibiting property owners and others from interfering in any way with the immediate possession of the United States for the purpose of using said rights-of-way.

Said suit, and said injunctive order, remained in effect until dismissed by the United States on December 18, 1934, four months and seven days after the petitioner, Mrs. Julia Caroline Sponenbarger, had filed her present action.

22. Funds being available for the purpose, actual construction work on the Jadwin Plan, as authorized by 374 the Flood Control Act of May 15, 1928, was in progress on January 10, 1929, when the President approved the Boeuf Basin Floodway, and said work was continuously prosecuted so that when the present suit was filed on August 11, 1934, the entire project was approximately 80 percent complete.

23. At the time of the trial beginning May 10, 1937, approximately all work which is intended to be done by the



United States under the provisions of the Flood Control Act of May 15, 1928, had been completed, it being no longer the intention of the United States to construct the Guide Levees on either side of the Boeuf Floodway as originally contemplated for the purpose of restricting and controlling the flooded area in said Boeuf Basin.

24. The side protection, or guide, levees which have not been constructed are not at all essential to the proper functioning of the Jadwin Plan in the adopted project, but were included merely to furnish local protection or reclamation to lands not involved in the present litigation. The construction of said guide levees would have no material effect upon the plaintiff's property. (House Doc. No. 798, pp. 47, 54).

25. The Jadwin Plan had been so far completed by the Government that since approximately the year 1931, or for three or four years prior to the filing of petitioner's suit, the fuse plug levee in the vicinity of Cypress Creek and the Boeuf Floodway were in a condition to function as designed and intended by the Flood Control Act of May 15, 1928, which condition continued until the date of the filing of the petitioner's suit, and since.

26. The escape of flood waters through the Boeuf Floodway is an essential feature of the Jadwin Plan; and as late as the report of the Chief of Engineers dated February 28, 1931, was considered an essential feature of any economically feasible plan for the control of floods in the lower Mississippi Valley. (House Doc. No. 798, p. 26; Sec. 17 and p. 29, Sec. 22 (f) ).

375 27. As late as February 28, 1931, it was estimated by the Government Engineers that "The momentary peak flow into the Boeuf Basin at the vicinity of Cypress Creek may be 1,250,000 cubic feet per second, the average for about 10 days being about 900,000 cubic feet per second." (House Doc. No. 798, p. 44, Sec. 8).

28. The present Chief of Engineers, United States Army, Maj. Gen. Edward M. Markham, as late as January 27, 1936, illustrated this volume of water in his testimony before the Senate Committee on Commerce, as follows:

"We faced the problem of dealing with a vast volume of water to be taken out of that river (Mississippi River), most people having no yardstick whatsoever as to what that volume of water is. We say it is 1,000,000 feet, and, in order to produce a yardstick that anybody can readily understand, I would suggest that that is pretty nearly six times all the water that flows over Niagara Falls. It is pretty nearly five

times all the water that flows down the St. Lawrence River to the sea." (Hearings, Senate Committee on Commerce, Jan. 27, 1936, p. 43).

The Chief of Engineers has publicly repeated the substance of this statement many times in public gatherings, the last time being before the National Rivers and Harbors Congress in Washington, D. C., after the 1937 flood, and within thirty days before the trial of this case began on May 10, 1937.

29. Before the House Committee on Flood Control, on February 27, 1934, General Markham, the Chief of Engineers, testified:

"I greatly sympathize with the Boeuf Basin really and truly. But the physical facts that can be verified by any intelligent engineer are these: It is perfectly manifest that something like a million cubic feet of water will have 376 to be handled in that valley \* \* \*. We therefore know that if you pile water below the fuse plug into that lower river you can look for a great disaster, a perfectly plain great disaster. \* \* \* The Boeuf Basin has been put in a very unfortunate situation since the levees below the Boeuf Basin were designed with the theory that we will not permit beyond about 1,800,000 second-feet to pass the fuse plug. \* \* \* I can consent to nothing that increases substantially the flow of water below the fuse plug beyond 1,850,000 second-feet, because it courts disaster." (Hearings, House Committee on Flood Control, February 27, 1934, pp. 24-25).

30. The fuse plug levee lying at the head of the Boeuf Floodway, between the petitioner's property and the main channel of the Mississippi River, was on May 15, 1928, a then standard levee, substantially at the 1914 grade and section. Grade indicates the height of the levee. Section indicates the width and form of a cross-section of the levee. The 1914 grade at Arkansas City represented a height of levee which would not be overtopped until the water in the Mississippi River rose to a gauge of 60.5 on the Arkansas City gauge.

31. For many years prior to 1928 all levee grades and sections along the main stem of the Mississippi River in its alluvial valley were established by the Mississippi River Commission. No Federal funds were contributed to the building of these levees except those which were constructed under the supervision of the Mississippi River Commission, at locations approved by it, on rights-of-way furnished by the local interests, and according to grades and sections fixed and approved by the Mississippi River Commission, given

jurisdiction by federal statute. (See Title 33 U. S. C. A., Secs. 641, 647, 648, 701, 702).

32. All levees on the main stem of the Mississippi River, and on the south bank of the Arkansas River as indicated on the official maps of the Jadwin Plan, except the relief or fuse plug levees, since the passage of the Flood Control Act of May 15, 1928, have been constructed by the United States to the 1928 grade and section. This means that the levees upstream and downstream from the Cypress Creek fuse plug levee, and the levees opposite on the east side of the Mississippi River in the State of Mississippi, are substantially three feet higher than the fuse plug levee and practically twice as large in the cross-section of width and height, thus constructed to insure that the fuse plug levee will be overtopped or crevassed before any of the other levees mentioned shall fail, thus insuring that excess water will leave the main river in the vicinity of Cypress Creek below the mouth of the Arkansas River.

33. No flood has overtopped or crevassed the fuse plug levee since it was completed by local interests in the year 1921, it having been successfully defended and held by the local interests even during the unprecedented flood of 1927. It was relieved by a crevasse in the State of Mississippi substantially opposite the plaintiff's property, referred to as the Mound Crevasse, through which there was an estimated discharge of flood water in 1927 of 500,000 cubic feet per second; and further relieved by crevasses in the south bank of the Arkansas River indicated on the maps as South Bend Crevasse, Pendleton Crevasse, and Medford Crevasse.

34. When the Flood Control Act of May, 15, 1928, was passed, contracts had been let by local interests, and construction was under way, repairing the Arkansas River levee crevasses above mentioned. Since May 15, 1928, the United States has completed the levee on the south bank of the Arkansas River from the vicinity of Pine Bluff to Yancopin near the mouth of the river to the 1928 grade and section as authorized and directed by the 1928 Flood Control Act.

35. No maintenance or work of any kind was done by anyone on the fuse plug levee after the passage of the Flood Control Act of May 15, 1928, and prior to the filing of petitioner's suit on August 11, 1934.

In preparation for the 1937 flood out of the Ohio River, an insignificant amount of work was done at a few low places on the levee toward bringing it back substantially to the 1914

grade and section as authorized by the Flood Control Act of May 15, 1928.

Also, under authority of the Flood Control Act of May 15, 1928, because of caving banks endangering the original fuse plug levee at Cypress Bend, several miles upstream from Arkansas City, during the year 1936 the United States constructed a set-back levee, of the same grade and section as the original fuse plug levee, extending from the outskirts of Arkansas City northward approximately 8 miles. This new set-back levee, constructed long after the petitioner's suit was filed, is now a part of the Boeuf Floodway fuse plug levee as authorized by the 1928 Flood Control Act, being itself a relatively smaller, weaker relief levee than the levees North and South of the fuse plug levee, and relatively lower and weaker than the main stem levee on the East side of the Mississippi River.

36. This fuse plug levee, lying between petitioner's property and the main channel of the Mississippi River, is an essential and vital feature for the flood control of the Mississippi River in its Middle Section under the Flood Control Act of May 15, 1928, being necessary not only for the protection of the remainder of the alluvial valley in this section outside of the Boeuf Floodway, but also essential for the protection of all other Government levees in the Middle Section of the river, and probably beyond, especially the main stem levees on both sides of the river downstream from the fuse plug levee.

37. Raising and strengthening this fuse plug levee to the 1928 grade and section, authorized by the Flood Control Act for other levees, would defeat the Jadwin Plan, and would destroy its purpose that excess flood waters will leave the main river at the fuse plug section in the vicinity of Cypress Creek passing down the selected Boeuf Floodway diversion. The problem of flood control in the alluvial valley would be placed back substantially where it was prior to the passage of the Flood Control Act of May 15, 1928, in that excess waters would escape haphazardly and at entirely unpredictable places with disastrous consequences. Only by depriving the property owners in the Boeuf Floodway of their right of self-defense, formerly exercised by raising this fuse plug levee during flood fights, can the Jadwin Plan be effective. In fact, as well as in law, in this respect these property owners have had taken from them such right of self-defense by the passage of the Flood Control Act of May 15, 1928, and no longer have the right or power to raise or strengthen this fuse plug levee beyond its grade and section which existed



at the time of the passage of the Flood Control Act of May 15, 1928, namely, the 1914 grade, section and strength, which levee must now be overtopped when the water passes a stage of 60.5 feet on the Arkansas City gage. At this time the other main stream levees of the Mississippi River in the Middle Section, and the levee on the south bank of the Arkansas River, will have a freeboard of 3 feet or more of additional levee height.

38. In 1921, local interests, with Government aid and consent, closed the gap in the main line levee at the mouth of Cypress Creek which theretofore had constituted an outlet for flood waters of the Mississippi River. When the opening at the mouth of Cypress Creek was closed in 1921, the present fuse plug levee on the west side of the Mississippi River became a complete, standard levee; and has not since  
380 been either overtopped or crevassed. Since 1921 the plaintiff's property has been protected by this levee from all flood water diverted from the main channel of the Mississippi River, even during the unprecedented flood of 1927.

Therefore, any and all water which may hereafter pass over the plaintiff's property by reason of overtopping or breaching this fuse plug levee will be additional destructive flood waters that will pass over petitioner's property by reason of diversion from the main channel of the Mississippi River as contemplated by the provisions of Section 4 of the Flood Control Act of May 15, 1928.

39. Because of the construction work done by the United States under authority of the Flood Control Act of May 15, 1928, for several years prior to the filing of petitioner's suit her property has been subject to the continuing menace of additional destructive flood waters passing by reason of artificial diversion from the main channel of the Mississippi River, authorized by the Flood Control Act of May 15, 1928, at a place, and in a manner, not theretofore existing.

40. The petitioner has proved by a preponderance of the evidence the material allegations of her petition charging a taking of her property by the United States within the meaning and provisions of the Fifth Amendment to the Constitution of the United States which provides that private property shall not be taken for public use without just compensation.

41. The history and physical facts descriptive of the Boeuf Floodway as recited in the court opinions in the cases of Kincaid vs. United States, 35 Fed. (2d) 235, and 37 Fed.

(2d) 602, and 49 Fed. (2d) 768, are established by the evidence in the present case.

381 42. The Jadwin Plan of flood control in the Middle Section of the Mississippi River as authorized by the Flood Control Act of May 15, 1928, and as constructed by the United States prior to the filing of petitioner's suit, involved an intentional, additional, occasional flooding of petitioner's property and constituted a taking thereof as soon as the Government began to carry out the authorized project. (See *Hurley vs. Kincaid*, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637).

43. The Congress of the United States contemplated, and expressed its intention, that the United States should be liable for the taking of property in the Boeuf Floodway resulting from the passage of the Flood Control Act of May 15, 1928, evidenced by its Committee Reports and congressional debates. (See pp. 83-93 and 211-231, Petitioner's Brief in United States Court of Claims, *Southeast Arkansas Levee District et al. vs. the United States*, No. 42,718).

44. This contemplated and authorized "taking" of petitioner's property occurred January 10, 1929. (See President's letter of approval dated January 10, 1929. Com. Doc. No. 2, 71st Congress, p. 12).

45. The petitioner, Mrs. Julia Caroline Sponenbarger, since January 20, 1927, has been, and at the time of trial continued to be, the absolute owner in fee simple of the SW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Section 31, Township 12, South, Range 1, West, 40 acres of land lying in Desha County in the State of Arkansas. Plaintiff has been in the actual, open, notorious, continuous, peaceable, exclusive, adverse possession of said tract of land since said date of her Warranty Deed from George Hight and wife, namely, January 20, 1927. The plaintiff's record and actual title to said property is established without contradiction or question.

46. Plaintiff's said property is located approximately one mile and a half west of Arkansas City, Arkansas, abutting Arkansas State Highway No. 4, a paved highway  
382 which at the time of plaintiff's purchase constituted an interstate highway by reason of a ferry operated across the Mississippi River in the vicinity of Arkansas City. This paved, improved State Highway gave plaintiff's property excellent connections with Little Rock, the capitol city of the State, and other points and markets north and south.

47. Petitioner's said property is located near the head of the Boeuf Floodway as created and authorized by the Flood

Control Act of May 15, 1928, about one mile from the nearest point to the fuse plug levee southeast of plaintiff's property, and about seven miles south of Lucca Landing, a point near the upper end of the fuse plug levee in the general vicinity of the former mouth of Cypress Creek (Opposum Fork).

48. For all practical purposes, as contemplated and intended by the Flood Control Act of May 15, 1928, the fuse plug levee at the head of Boeuf Floodway has been in operative condition since approximately the year 1930, ready for operation and use whenever the need therefore might arise as designed by said Flood Control Act. Since approximately the year 1930 the point at which the fuse plug levee would probably have first crevassed, failed or been overtopped was, and at the time of trial continued to be, in the vicinity of said Lucca Landing near the upper end of said fuse plug levee.

49. When the fuse plug levee overtops and crevasses the escaping flood waters from the Mississippi River will wash away a large portion of the fuse plug levee not only down to the bank-full stage (approximately 42 feet on the Arkansas City gage), but will probably, by the enormous force of its released current, scour out a deep hole in the vicinity of the crevasse, commonly called a "blue hole". Blue holes are sometimes washed out as deep as 50 or 60 feet below the ordinary bank surface or elevation.

383 50. When a crevasse occurs, the entire fuse plug levee will be subjected to wave-wash erosion from the floodway side as well as from the river side, making it practically impossible to maintain it.

51. The surface of petitioner's land lies from 20 to 25 feet lower than the flood level at the top of the fuse plug levee; that is, petitioner's land lies from 20 to 25 feet lower than an elevation equivalent to 60.5 feet on the Arkansas City gage.

Immediately before the fuse plug levee overtops and crevasses (unless it crevasses before it overtops), the surface of the water in the Mississippi River, approximately one mile from the petitioner's land at the nearest point, will be flowing more than 20 feet higher than petitioner's land.

52. When the fuse plug levee is overtopped and crevasses in the vicinity of petitioner's land, especially if the breach of the levee is a comparatively short distance upstream from petitioner's property and at the point where the evidence shows it probably will "blow out", the released flood waters from the Mississippi River will flow over petitioner's prop-

erty at a depth of approximately 20 feet, and with a current sufficiently strong to float and wash away all movable improvements on the property. The surface soil will be seriously damaged, and the property subjected to destructive flood effects to which it has never before been subjected. A greater volume of water, and with more destructive current, will flow over petitioner's property than would be true had the Jadwin Plan not been constructed, and more than has ever been true in any previous flood of record.

53. In order for a levee to be safe from breaking from flood waters, it is recognized generally by engineers that the levee must have a freeboard from 3 to 5 feet; that is, the top of the levee should be from 3 to 5 feet above the surface of flood water for the levee to be safe. This is occasion-  
 384 ed by danger of wave-wash from high winds, the striking of the levee by boats or other heavy floating objects, the unexpected sinking or sloughing of the levee, and many other unforeseeable conditions. This fact applies especially to a fuse plug levee which is not watched and maintained, especially at such points where the fuse plug levee, as in the case at bar, is designated, intended and required to break.

The danger point of the crevassing of the fuse plug levee will be reached before the flood waters reach the top of the fuse plug section; and it will be necessary for the inhabitants of the floodway in the vicinity of petitioner's property to move out with all their personal property before the fuse plug levee is actually overtopped or crevasses.

When the fuse plug levee crevasses, and the Boeuf Floodway functions, as is planned and intended by the Flood Control Act of May 15, 1928, the petitioner's property will be subjected to flood water of far greater depth, velocity and duration than ever before.

54. At the time of her purchase, and since, the plaintiff's land was practically all in actual cultivation, well drained and of unusual fertility and productivity. The quality of farming land in this general area is often characterized by the amount of cotton per acre it will produce on an average year. Land which will so produce a bale of cotton per acre is considered the very best land in the territory suitable for agriculture. The plaintiff's property was this type of land, it being generally established that there was none better, not even in the limited arear of the rich alluvial valley of this stretch of the Mississippi River. At the time of its purchase, the nearby town of Arkansas City was a thriving market for agricultural products.



385 55. Even though farm lands in the general vicinity of plaintiff's property were exceedingly fertile and had produced many fortunes in the past, they had little market value until the closing of the gap in the levees at the mouth of Cypress Creek was assured. Then the lands were in great demand and market values increased very rapidly. When these levees were completed in 1921 land values were high, and approximately about the level at which plaintiff purchased her property in January, 1927. At the time of her purchase there was no indication that the property could ever be purchased any cheaper.

56. Plaintiff actually paid on the open market at the time of her purchase of this property the sum of \$100 per acre, and immediately thereafter added improvements to the property amounting to the additional sum of approximately \$25 per acre. The fair market value of the plaintiff's property at the time of her purchase and after said improvements, until the passage of the Flood Control Act of May 15, 1928, was \$125 per acre.

This represented the fair market value of such lands, so improved, in that general vicinity at that period of time.

57. The relatively high market value enjoyed by petitioner's property immediately before its taking under the Flood Control Act of May 15, 1928, is in part accounted for by the fact that Government statistics and graphs show exceedingly large crops to have been raised in this general vicinity during the year 1926, with sharp increases in the price of cotton during the year 1927, reaching more than twenty cents a pound. A very large crop followed by a relatively high price for cotton is reflected in this vicinity by sharp increases in the market value of farming property such as petitioner's.

386 58. Immediately after the passage of the Flood Control Act of May 15, 1928, and as soon as it became generally known in that locality that the property was located in the bed of the Boeuf Floodway as created and authorized by said Act, by reason of this changed condition the fair market value of plaintiff's property did not exceed \$25 per acre.

59. Since the autumn of the year 1928, when it became generally known that lands in this vicinity were within the limits of the Boeuf Floodway as authorized and designed by the Flood Control Act of May 15, 1928, continuing to the time of the trial, property of the same agricultural possibilities as petitioner's land but in the woods, and in many instances land ready for cultivation, adjoining the petitioner's property and

in the immediate vicinity thereof, had a fair market value, represented by many actual sales, at from less than \$1 per acre to approximately \$10 per acre, the depreciated and destroyed market value so represented being solely on account of the fact that the property was subjected to the flood menace contemplated, designed, intended and authorized by the Flood Control Act of May 15, 1928.

60. By reason of the "taking" of petitioner's said property for the public use aforesaid, she is entitled to "just compensation" which is properly measured by the difference between the market value of petitioner's property before and after such taking, together with interest thereon from the date of such taking. The Court finds from a preponderance of the evidence in this case that said just compensation to this petitioner, so measured, amounts to \$100.00 per acre, or the total sum of \$4,000.00, together with interest thereon at the rate of 6 per cent per annum from January 10, 1929, until paid.

61. Were plaintiff's property given equal protection with the other lands on either side of the Mississippi River in its Middle Section the protection of which is contemplated by the Flood Control Act of May 15, 1928, its fair market value would be not less than \$125 per acre.

387 62. The damage done to petitioner's property solely by reason of the construction work done by the United States under authority of the Flood Control Act of May 15, 1928, amounts to the sum of \$4,000, representing the depreciation and destruction of at least \$100 per acre of the actual market value of petitioner's property.

63. Among other elements of market value which were materially affected by the creation of the Boeuf Floodway, and among other items of petitioner's property which were taken as the result of work done by the United States under authority of the Flood Control Act of May 15, 1928, were the following:

(a) At the time of petitioner's purchase her property enjoyed the confident, assured, justified expectation of speedy and ultimate flood protection against the flood waters of the Mississippi River, equal to that enjoyed by other protected areas in the Middle Section of the alluvial valley of the river. For many years these property owners in the Boeuf Floodway had been taxing themselves, and issuing bonds secured by a lien against their property, for the purpose of building levee protection for their property along the main stem of the Mississippi River and up the south bank of the Arkansas River,

including that section of levee now known as the fuse plug levee. Because of the steady progress of this program, prior periodic floodings of petitioner's property had had no substantial effect on market values in that vicinity. On the contrary, for many years, as the work of levee building progressed, market values in this vicinity steadily increased. When it was finally assured that the levee line across the outlet of Cypress Creek into the Mississippi River would be built, this confident, assured, justified expectation of speedy and ultimate flood protection largely caused the high market values prevailing in the vicinity at the time of petitioner's purchase of her property in 1927.

388 This right to expect ultimate, equal flood protection was substantially destroyed and taken away by the Flood Control Act of May 15, 1928, thus causing the market values of property in the Boeuf Floodway in Desha County, Arkansas, to immediately drop as soon as the effect of said Act became generally known to the property owners in that vicinity.

(b) During the flood of 1927, and all former floods since 1921, the property owners protected by the fuse plug levee had exercised their right to protect their property against the flood waters of the Mississippi River by raising the levee along the river by means of bulwarks, sacked earth, and other temporary works in order to hold their levee until the levees gave way elsewhere and relieved the pressure against what now constitutes the fuse plug levee. Because of better soil conditions these property owners were able to safely hold this fuse plug levee against even the unprecedented flood of 1927 until relief was secured by the breaking of the levee on the opposite side of the river in the State of Mississippi, flooding a very large area of that State. By the passage of the Flood Control Act of May 15, 1928, it will be no longer lawful to raise the fuse plug levee higher than a gauge of 60.5 feet on the Arkansas City gauge whereas the other standard 1928 levees are approximately 3 feet higher. Thus a substantial part of the right of self-defense, or the right to protect her property, was taken from petitioner by said Flood Control Act of May 15, 1928, by constructing works which will result in the failure and crevassing and overtopping of the levee line between petitioner's property and the Mississippi River before other levees of the authorized 1928 grade and section give way. This fact and law immediately affected the market value of plaintiff's property as hereinbefore indicated.

389 (c) As soon as the facts became generally known, all security value to lands in the Boeuf Floodway in Desha

County, Arkansas, was practically destroyed. The Governmental lending agencies, the Federal Land Bank, private banks and private lending agencies, adopted a definite policy of making no further loans on the security of land in this vicinity; whereas, prior to the passage of the Flood Control Act of May 15, 1928, loans were made generally on the lands in this area.

This serious impairment of security or credit value of petitioner's property immediately affected its market value.

(d) Annual crops in this vicinity are largely based on annual crop financing or credits. The agencies formerly affording such credit now withhold such credit each year until all apparent danger of the necessity of using the Boeuf Floodway has passed. Thus all annual crop credit is uncertain and precarious, and no property owner may know any year whether or not he will be able to cultivate his land the following year. Because of this continuing menace each annual crop is in the nature of a gamble. This condition enters into the loss of market value of farming lands in this vicinity.

(e) Shortly after the effects of the Flood Control Act of May 15, 1928, became generally known, all insurance companies cancelled their policies of insurance in Arkansas City and withdrew from the vicinity of petitioner's property. Insurance values in the Boeuf Floodway in Desha County were destroyed. The ability to secure adequate insurance is a valuable part of the market value of property in that vicinity.

(f) The petitioner bought her property for the purpose of building a residence thereon and making it her home, the location being convenient to her business interests in Arkansas City, and the market then there existing. No prudent person would now build a substantial or satisfactory residence on property located within this floodway. The residence and home value of petitioner's property was practically destroyed by the creation of the Boeuf Floodway.

(g) No prudent person would build valuable or permanent improvements of any kind such as are suitable for the best use of fertile agricultural land located as is petitioner's property in the Boeuf Floodway. It would be unwise to make any substantial investment in permanent, worthwhile improvements, because a flood as contemplated by the Flood Control Act of May 15, 1928, is likely to come any year and wash them all away. The right to improve one's property, such as that of the petitioner's, as the owner sees fit, is a valuable right of property directly affecting its market value. This right of the petitioner has been substantially impaired.



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(h) Approximately only 20 percent of the lands in Desha County lying within the Boeuf Floodway as designed by the Flood Control Act of May 15, 1928, were in actual cultivation at the time of the passage of said Act. Practically all of the remainder of said area was cut-over timber land, susceptible to being put in a state of cultivation at a cost of from \$25 to \$40 per acre. At the time of plaintiff's purchase the development of this cut-over timber land was proceeding regularly and rapidly. The development of such wild land increased generally the market values of all property in the vicinity as such improvement and population increased. Such development followed the closing of Cypress Creek gap in 1921. This development, and the legitimate sale of such lands on the open market, was completely changed as the result of the Flood Control Act of May 15, 1928, because the lands could not then be sold on the market within the floodway for the actual cost of putting them into cultivation. Large areas were therefore forfeited to the State, and to various improvement districts, for the nonpayment of taxes because of the loss of these market values. Later such lands were acquired for nominal prices, and a large number of settlers, commonly called donators or squatters, moved into the area and took up these lands without making any substantial investment. All this seriously and adversely affected the market value of petitioner's property.

(i) Shortly prior to the passage of the Flood Control Act of May 15, 1928, a number of active programs were being initiated, and some in actual operation, for the purpose of developing the general vicinity of the petitioner's property by selling lands, both cultivated and cut-over woodland, for general colonization by investors, at substantial prices. Before the passage of the Flood Control Act of May 15, 1928, such cut-over timber land susceptible to cultivation and profitable agricultural use was enjoying an actual market value of approximately \$40 per acre. The creation of Boeuf Floodway destroyed these values in the vicinity of petitioner's property, and therefore also affected the market value of petitioner's property.

(j) For many years the owners of petitioner's property had paid taxes and assessments for the building of levees for flood protection against flood waters in the main channel of the Mississippi River, issuing bonds for approximately \$3,000,000 for investment in permanent levees for permanent flood protection. By the creation of Boeuf Floodway this investment has now been converted into one of only temporary and partial nature, thus affecting the market value of petitioner's property.

(k) As a part of the program of flood protection, in order for the property owners to close the outlet of Cypress Creek with a levee line of the then standard grade and section, it became necessary for the property owners to issue bonds in approximately the sum of \$1,800,000, secured by lien on their lands, the proceeds of which were used for the purpose of constructing a very large drainage system planned by the United States Department of Agriculture, for the purpose of draining the property of surface waters which theretofore had emptied through Cypress Creek into the Mississippi River. This assessment or tax burden, annually paid, was a part of the program for permanent flood protection as well as for property drainage. This investment has been substantially impaired as to the property lying within the Boeuf Floodway, because the first time said floodway is actually used said drainage system will probably be seriously impaired, if not rendered useless. The menace of the repeated use of said floodway increases this hazard. Thus a substantial portion of the investment made by the owners of petitioner's property, which entered directly into its market value at the time of petitioner's purchase, has been lost by reason of the Flood Control Act of May 15, 1928.

(l) The drainage plan for this area submitted by the Department of Agriculture of the United States called for the digging of many lateral ditches emptying into the main canals, thus clearly increasing the desirability of the general vicinity of petitioner's property by perfecting the general drainage of the area. This value has been taken and lost because such work can be done only by issuing bonds for large amounts for such purposes, and it is no longer possible to sell bonds the security of which can be based only on property lying within the limits of this floodway created by Federal law.

(m) The market value of farm property is directly affected by its proximity and accessibility to suitable and thriving markets. Arkansas City constituted such a market for the petitioner's property at the time of its purchase. Because of the creation of the Boeuf Floodway, and as a direct result of the passage of the Flood Control Act of May 15, 1928, Arkansas City as a market has been lost, the town and all values in said city have been demoralized and its population dissipated. This has directly affected the market value of petitioner's property.

(n) Since the creation of the Boeuf Floodway, that portion of State Highway No. 4 which runs along the entire front of petitioner's property has been practically abandoned as an [interstate] road, and is no longer maintained by the State

authorities as such, and is rapidly deteriorating, being temporarily patched from time to time by the State authorities anticipating the destruction or deterioration of the road by the use of the floodway as intended by the Flood Control Act of May 15, 1928. This change of highway and transportation facilities adversely affects the market value of petitioner's property.

(o) At the time of the purchase of petitioner's property, it was near excellent schools located in the then thriving village of Arkansas City. As the result of placing Arkansas City on the far, riverside of Boeuf Floodway, the school revenue and population have so decreased that no longer are the schools and educational advantages accessible which existed at the time of petitioner's purchase of her property, and which affected the market value of her property.

(p) Because of the large amount of tax delinquencies and property abandonment in the limits of the Boeuf Floodway in Desha County, Arkansas, the county has lost such large amounts of revenue that it is no longer able to furnish many of the normal governmental agencies which give value to farm property, such as United States County Agents, Health Nurses, bridge building, etc. Thus, property owners who retained their property, as the petitioner has done, are required to pay for such governmental agencies in addition to their regular taxes, thus increasing the tax burden of such property as the petitioner's, and thus in turn affecting its desirability and market value.

394 (q) The flood menace to petitioner's property because it is within the limits of the Boeuf Floodway is a continuous one, the time of the use of said floodway being entirely unpredictable. No authority can assert with any confidence what year years the floodway will be used. The use of the floodway is a threat not only to property values but even to family health and life. A purchaser of property for home and family use, or for active farming operations, looks to future health conditions and such contingencies as flood menaces. The usual purchaser will not buy property which is not only threatened, but practically assured, of floods from time to time. This decreases the market value of property such as petitioner's on the floor of the floodway.

(r) By the passage of the Flood Control Act of May 15, 1928, and the authorized acts of its agents thereunder and thereafter, the United States has impressed a servitude or easement upon the petitioner's property, being the right to



flood the petitioner's property in such volume and at such times as may be necessary within the provisions of the Jadwin Plan. This fact actually invades to a certain extent the Title of the petitioner to her property. No longer does she enjoy the exclusive right to use her property in any way she sees fit, and to dispose of the entire and complete title to her property. Any conveyance by the petitioner after the passage of the Flood Control Act of May 15, 1928, was necessarily subject to the terms, provisions and consequences of said Act.

64. The Mississippi River in times of flood carries in suspension large quantities of silt, sand and mud, as well as floating vast quantities of debris of various kinds, including logs, trees, and heavy trash. Much of all this will be carried into the Boeuf Floodway when it is flooded as designed by law. Much of the land between petitioner's property and the point where the fuse plug levee will most likely first crevasse has been cleared of timber, and the topography is such that the flood water will course freely through that section of the floodway carrying large quantities of such debris, silt, sand and mud to the petitioner's property, probably either seriously eroding the petitioner's property by destructive currents, or else depositing on the petitioner's property large quantities of such debris. There will also be a tendency either to scour out and destroy the drainage ditches which serve the petitioner's property, or else fill up the same with silt, sand, mud, debris and soil eroded by the current in the floodway before reaching petitioner's property. This constant menace seriously impairs the market value of petitioner's property.

65. It is to be reasonably apprehended that whenever the Boeuf Floodway goes into operation, and functions as is designed by the Flood Control Act of May 15, 1928, the additional, destructive flood waters diverted into it from the main channel of the Mississippi River will either destroy, or seriously impair, damage, deteriorate, wash out or undermine the houses, buildings, fences, ditches, roads, bridges, and crops on the petitioner's property, and in that vicinity, thereby interrupting for an indeterminate length of time the use of the property, interfering with access to or egress from the property, and will greatly endanger any and all life which may be left on the property when the flood water comes.

Army Engineers testifying before Congressional Committees frankly admitted that no prudent person would build a residence within the limits of the Boeuf Floodway; and that

396 dwellings for man or beast would not be safe during flood times unless such dwelling were built on stilts 20 feet high, as is sometimes done by the natives in the flood areas of the Phillipine Islands.

66. Since the petitioner's property has been placed in the Boeuf Floodway as a result of the Flood Control Act of May 13, 1928, desirable tenants have avoided the property in the vicinity of petitioner's land because of the flood menace, so that her land has been rendered less profitable and more unsuitable for renting to desirable or profitable tenants.

That the area is being overrun with squatters or donators who come in as scavengers after destruction and take up abandoned lands without the necessity of any substantial investment, does not tend to enhance the market value of petitioner's property.

67. The general economic depression which affected the country at large, beginning with the year 1930, does not account for any of the loss of market value to petitioner's property hereinbefore referred to, because the petitioner's property had lost its market value as hereinbefore recited many months before the general depression of 1930 began. While general property values elsewhere were at a peak during the boom prices and inflation of 1929, the petitioner's property and other property in that vicinity in the Boeuf Floodway had lost its market value as hereinabove stated. There was not enough value left to be seriously affected by the later depression. One cannot kill a dog already dead.

Furthermore, the passing of the general depression, and the return to normal values and prices of farming properties generally in protected areas has not, and will not, bring back the market value of the petitioner's property or other property in that vicinity on the floor of the Boeuf Floodway.

397 Therefore, under the peculiar facts of the case at bar, the general economic conditions of the country elsewhere have played, and will play, no important part. They offer no explanation whatever of petitioner's special and peculiar loss.

68. Much testimony was offered relative to the tax burden and bonded indebtedness of such of the area affected by the Boeuf Floodway. This evidence is immaterial as to the petitioner's property, and merely tends to confuse the issue. No tax burden has increased since the petitioner bought her property January 20, 1927. No bonded indebtedness affecting

this property has been increased since plaintiff bought her property. Petitioner's property had a fair market value of \$125 per acre notwithstanding its tax burden and the bonded indebtedness affecting it. Had the tax burden been substantially lighter the market value would probably have been higher, but no part of the loss of market value hereinabove referred to can be justly attributed to the tax burden or bonded indebtednesses affecting the property. The values mentioned actually existed in spite of those burdens, and the market value of petitioner's property was lost regardless of those burdens.

69. The petitioner has paid all taxes and assessments maturing against her property to the date of the trial.

70. While the petitioner's property had many times been subjected to overflow in previous reported floods, these floods prior to the passage of the Flood Control Act of May 15, 1928, came from points far distant from the plaintiff's property and rose slowly, quietly, and without any destructive currents over the petitioner's land, gradually subsiding as the flood passed, leaving on petitioner's property a deposit of silt enriching the soil. In fact, all of the property in this vicinity has been built up through ages past in this way, which accounts for the great fertility in this alluvial valley.

These early floods that came before there was any fixed plan for closing the Cypress Creek gap outlet of the Mississippi River did prevent the affected lands from devel-

oping any substantial market value. However, when

the plan for closing this gap was developed and became generally known, then no longer did the floods seriously affect the market values of this property because the market values involved grew and were based on the expectancy of closing the gap resulting in the ultimate, speedy protection of the lands from further overflow. Bonds were easily sold for the purpose of drainage and levee works based alone on security values in this area because it was generally understood the property would soon be completely protected.

Now, however, by reason of the passage of the Flood Control Act of May 15, 1928, the situation is entirely changed. Hereafter, when the fuse plug levee at the head of the Boeuf Floodway fails as is intended and contemplated by the Jadwin Plan, petitioner's property will be subjected to the destructive onrush of head waters from the crevasse, with disastrous effects on all property in its immediate pathway, and all further substantial security values for further internal improvements have been destroyed.

71. The petitioner's property will be subjected to head water flooding through crevasses in the upper fuse plug levee until the fuse plug levee is reconstructed, if at all, after such break. The crevasses cannot be closed by rebuilding the fuse plug levee until long after the flood season of the particular year when the crevasse occurs. Therefore, after the first breach of the fuse plug levee, thereafter all over-bank-full stages of the river (approximately 42 feet on the Arkansas City gage) will again put water over the petitioner's property, until such time as the gap in the levee is repaired.

No provision is made in the Flood Control Act of May 15, 1928, nor in the Jadwin Plan, nor have any appropriations been made, for the closing of such crevasses.

399 72. The United States has paid for flowage rights in the Bonnet Carre Floodway in the lower section of the Mississippi River, and in the Birds Point-New Madrid Floodway in the upper section of the Mississippi River, two of the floodways authorized and created by the Flood Control Act of May 15, 1928. The United States has not paid, nor offered to pay, anything to the petitioner; nor has any condemnation suit been brought against the petitioner, or her property, under the provisions of the Flood Control Act of May 15, 1928, or any other law.

73. The Boeuf Floodway cannot operate in the manner intended by the Flood Control Act of May 15, 1928, unless the fuse plug levee at its head is kept approximately 3 feet below all other 1928 levees. As the result of construction work done under authority of the Flood Control Act of May 15, 1928, the United States has accomplished this purpose. For all practical purposes in the matter of relieving the main channel of the Mississippi River in its Middle Section of excess water beyond the safe capacity of the levees below the fuse plug, the Boeuf Floodway is, and approximately since the year 1930 has been, complete and ready for operation and use whenever the need therefor might arise. The United States has acquired and taken every right needed for this project and purpose, and the property of the petitioner has to all intents and purposes since approximately 1930, been subjected to every possible use contemplated by the taking. This is a taking within the meaning and intention of the Fifth Amendment to the Federal Constitution, and entitles the petitioner to compensation in this suit. (See *U. S. vs. Yazoo & M. V. Ry. Co.*, 4 Fed. Supp. 366; *Jacobs vs. U. S.*, 45 Fed (2d) 34; 63 Fed. (2d) 326; 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142; *Kincaid vs. U. S.*, supra).



74. Formerly there was a fair chance of levee lines breaking elsewhere. Now the fuse plug levee alone must give way.

400 The value of all protected lands in the alluvial valley of the Mississippi River has thereby been immeasurably increased; and all market values of real property in the floodway have been correspondingly decreased.

75. The Flood Control Act of May 15, 1928, adopts a plan of flood control which definitely sacrifices the property on the floor of the Boeuf Floodway for the better protection of vast areas of other property in the alluvial valley of the Mississippi River. Neither the Jadwin Plan, nor any other construction done or authorized by the Flood Control Act of May 15, 1928, was intended to result in any benefit whatever to the petitioner's property near the head of the Boeuf Floodway, nor has any such authorized construction contemplated by said Act resulted in any such benefit to petitioner's property, nor will any such benefit result to petitioner's property.

The difference in the market value of petitioner's property before and after the taking is the true, complete and exclusive legal measure of just compensation to which she is entitled.

76. Past experience has shown that due to a multitude of and constantly changing, unforeseen and unpredictable factors and conditions, the floods of the Mississippi River in the past can furnish no definite formula or rule for its future floods.

It is impossible to know or predict in what year or years, or at what period of any year, a flood will occur in the future; or how many crests or waves the same flood will have; or what will be the volume, extent, or period of duration of any flood, or of any crest thereof; or how frequently major floods will occur; or whether they will occur in one or more successive years; or how often they will exceed 60.5 feet on the Arkansas City gage.

No two floods seem to have the same characteristics, but each flood is unique as to type, method of formation, 401 results, method of fighting, and threat to levees. Past official estimates for future floods have uniformly proved insufficient.

These uncertainties add largely to the petitioner's damages, and account in a large measure for the loss of market value which must be taken into account in adequately measuring the just compensation which must be awarded to petitioner.

The flood menace to petitioner's property is a constant, continuing one, and has existed potentially at all times since material construction has progressed on the Jadwin Plan as authorized by the Flood Control Act of May 15, 1928.

77. Much evidence was offered by the United States relative to experimental work done by the Government in the artificial digging of a number of cut-offs below the mouth of the Arkansas River and above the mouth of the Red River which at the date of the trial had shortened the bank channel of the river between these points approximately 100 miles. The flood channel, representing the distances between the tops of the levees on either side of the river, has not been shortened by any substantial change of levee locations in this stretch of the river. Geographically it is still the same distance between levee lines from the mouth of the Arkansas River to the mouth of the Red River, or from Arkansas City to Angola.

78. These cut-offs were not contemplated as a part of the Jadwin Plan, but, on the contrary, were expressly rejected as being too uncertain and threatening to warrant adoption. (Doe. 90, Sec. 69).

79. The evidence offered by the United States as to the ultimate effect of these cut-offs was based almost entirely upon the observed results of one flood, namely, that of 1937, coming out of the Ohio River. This was an unusual flood, sometimes characterized as a "flash flood", or a freak flood. It would not be safe to predict at this time the ultimate effects of this cut-off program when the same has been completed; but, on the contrary, a long period of years, 402 and testing by a number of different major floods, will be necessary before proper appraisal can be given as to the ultimate beneficial or detrimental effects of these cut-offs, as they affect the flood hazard to petitioner's property.

80. It is already established that the observed beneficial effects of these cut-offs, which apparently lowered the flood gage at Arkansas City during the 1937 flood, decrease progressively as the flood stage rises above the bank-full stage of the river. Petitioner's property is not seriously menaced until the flood stage approaches the gage of 60.5 on the Arkansas City gage—the top of the fuse plug levee. At that gage the beneficial effects of the cut-offs will be so greatly decreased as to not be measurable at the present time.

81. This program of trial cut-offs was initiated by the President of the Mississippi River Commission after June, 1932, long after the petitioner's property had been "taken"

by the United States. It was a complete reversal of the former policy of the Mississippi River Commission, and against the general consensus of opinion of the engineers who had studied and written on the problem for 50 years or more, which former policy had been to prevent even natural cut-offs by building dikes along the necks of peninsular loops in the river. The United States definitely condemned and rejected this program of cut-offs for a number of years after the passage of the Flood Control Act of May 15, 1928.

82. It is the tendency of a river in an alluvial valley like the Mississippi to maintain a fairly constant length in its main channel. From the years 1722 to 1884, inclusive, there were 20 natural cut-offs of the river similar to those artificially created since 1932. The aggregate reduction in river length caused by 19 of these cut-offs between 1776 and 1884, inclusive, was 228 miles. Notwithstanding this length of Mississippi River channel so actually cut off, the river, acting under the influence of natural forces, had regained its length to the extent that in 1929 its length from Cairo to Baton Rouge was only 2.6 miles shorter than its length between these points in 1765.

Although man's efforts have hindered channel shifting, they have by no means controlled it; nor is complete control possible except in the comparatively remote future when the extensive revetment and dredging program necessary for complete control becomes economically justified. The length of the river channel is the complex resultant of many factors, among which the principal are slope, volume, velocity of discharge and the character of bank soil.

It has not yet been definitely proved that the present cut-off program of the Mississippi River Commission will ultimately and permanently relieve the flood menace to petitioner's property.

83. No witness produced by the United States was authorized to speak authoritatively for the Government as to the anticipated results of this cut-off program. On the contrary, each of the technical witnesses produced by the defendant on the subject admittedly expressed only his own personal views. The failure of the defendant to produce such witnesses as Major General E. M. Markham, Chief of Engineers, Brigadier General H. B. Ferguson, Corps of Engineers, President of the Mississippi River Commission, and Lieutenant Colonel Lunsford E. Oliver, District Engineer, at Vicksburg, to testify on this point, raises the presumption that the testimony of such witnesses would not have supported the defense on this point tendered by the Government.

On the contrary, the evidence establishes the fact that the Chief of Engineers, Maj. Gen E. M. Markham, who does speak with authority for the defendant, in public and official addresses and testimony continued long after the 1937 flood and to within 30 days preceding the trial of the present case, notwithstanding the cut-offs completed and contemplated, expressed the conviction that a floodway on the west side of the Mississippi River, south of the mouth of the Arkansas River, is still a vital, essential and fundamental part of any practical program for flood control in the Middle Section of the Mississippi River, and that this "lower part of the Mississippi Valley will continue to be in jeopardy of a repetition of the 1927 disaster unless 1,000,000 cubic feet per second of excess water is taken out of the river on its west side, a flow five or six times that of Niagara Falls at ordinary stages."

In fact, the Chief of Engineers, speaking authoritatively for the United States under the provisions of the Flood Control Act of May 15, 1928, as well as under the provisions of the Flood Control Act of June 15, 1936, continues to publicly express the conclusion of the Corps of Engineers of the United States Army that a floodway west of the river in its Middle Section south of the mouth of the Arkansas River is vital and necessary, notwithstanding the cut-off works done in the cause of, and for the purpose of, channel stabilization.

84. No witness offered by the defendant advised, advocated, or consented to the elimination of the fuse plug levee by raising and strengthening it to the 1928 grade and section as authorized by the Flood Control Act of May 15, 1928, and as continued by the Flood Control Act of June 15, 1936. Only by building the fuse plug levee to the standard grade and section of all other levees can the market value of plaintiff's property be restored.

85. The preponderance of the evidence relative to the ultimate effect of the present program of the Government in making artificial cut-offs in the river, establishes that:

405 (a) The effects of said cut-offs, as they existed at the time of the trial of this cause, are probably only temporary; and

(b) They are local in their effect, changing from time to time in the course of nature as the enormous force of the river current operates; and



(c) That no measureable effect of these cut-offs had been observed on the gage at the mouth of White River at the time of the trial; and

(d) That the beneficial effects of cut-offs decreases progressively and parabolically as the flood stage rises above the bank-full stage; and

(e) That the beneficial effects of the cut-offs below the latitude of petitioner's property had already decreased between the high waters of 1936 and 1937, indicating a channel deterioration below the cut-offs; and

(f) That the cut-offs tend to pile up water below them, due to the increased velocities of the stream while running through cut-offs, thus lowering the flood plane most through the cut-off itself where the current drops most rapidly; and

(g) That these increased velocities through the cut-offs not only endanger the levees below where the water is retarded and piles up, but causes serious erosion and threatens bank caving where the velocity of the current is increased; and

(h) That the observed differences in discharge capacity, and in the Arkansas City gage readings, since the development of the cut-offs has not been strikingly different from the differences in discharge capacity and gauge readings of other floods of record in the past performance of the river during different flood stages prior to the establishment of cut-offs; and

406 (i) This cut-off program has not materially affected the market value of the petitioner's property.

86. The development of Caulk's Neck cut-off, upstream from the latitude of petitioner's property and below the mouth of the Arkansas River, will greatly increase the velocity of the main channel of the river at that point, directing the current directly against the fuse plug levee in the vicinity of Lucca Landing; shifting the temporary effect of the lower cut-offs upstream, and increasing the probability of the failure of the fuse plug levee in the vicinity of Lucca Landing, immediately upstream from the petitioner's property.

87. When the crest of the 1937 flood reached the latitude of the mouth of the Arkansas River, and the latitude of petitioner's property, the reservoir capacity of the lower channel of the Mississippi River throughout to its mouth at the

Gulf of Mexico, and the reservoir capacity of the back-water area extending upstream from the mouths of the Arkansas and White Rivers, were relatively empty. These factors were material in enabling the fuse plug levee to carry the crest of the 1937 flood past its length.

Had the Arkansas and White River Basins contributed to the crest of the 1937 flood a volume of water comparable to that which was contributed to the crest of the flood in 1927, the fuse plug levee would have been overtopped and crevassed and the Boeuf Floodway would have functioned as planned and intended by the Flood Control Act of May 15, 1928.

88. The 1937 flood crest out of the Ohio River valley reached a gage of approximately 54 feet at Arkansas City with all the cut-offs functioning. Had the Arkansas and White Rivers contributed approximately 1,200,000 cubic feet per second as they did in 1927 the gage would have been raised 24 feet additional at Arkansas City, thus, if confined, reaching a stage of 78 feet, or 17.5 feet above the top of the fuse plug levee.

407 89. Since the cut-offs below the latitude of petitioner's property have been developed, a new cycle of erosion of the river banks has begun, probably due to the increased current caused by these cut-offs. For instance, since the opening of Ashbrook cut-off, the first cut-off below Arkansas City, the erosion during the flood of 1937, the first flood volume since the opening of said cut-off, was so destructive that the revetment on the west side of the Mississippi River in Yellow Bend, a short distance below Arkansas City, was seriously impaired and practically washed away. This revetment had just been completed by the United States at a cost in excess of \$500,000.

90. The enormous increase of erosion caused by the increased velocities of the cut-off system, carried by the river in the form of suspended sedimentation until the current of the river is retarded below the cut-offs when deposition of silt occurs, results in the deterioration of the lower channel and increases the danger to the levees below the cut-offs for which no anticipation or preparation is made by authority of the Flood Control Acts of either May 15, 1928, or June 15, 1936, each of which Acts contemplates relief by means of the diversion floodways west of the main channel of the Mississippi River, carried laterally, below the mouth of the Arkansas River.

91. For cut-offs to remain effective continuous dredging must be maintained and proper revetment works must be con-

structed and maintained. Former appropriations have all been expended. No present law or appropriations guarantee such necessary continuous dredging for maintaining cut-offs. No law requires that the experimental cut-offs be kept in working condition. The plaintiff has no assurance that these cut-offs will become a permanent part of the flood control program.

92. Under the provisions of the Flood Control Act of May 15, 1928, and as modified by the additional provisions of the Flood Control Act of June 15, 1936, the lands on 408 the floor of the authorized floodways and back-water areas are sacrificed for the protection of the balance of the alluvial valley of the Mississippi River.

93. The levee grades on the south bank of the Arkansas River between Pine Bluff and Yancopin, and also on the main stem of the Mississippi River between Helena and Rosedale, will be endangered if the diversion in the vicinity of Cypress Creek as authorized by the Flood Control Act of May 15, 1928, is moved downstream by reason of the cut-offs.

94. No appropriations have as yet been made for the purpose of executing the provisions of the Flood Control Act of June 15, 1936. The flowage rights required by the provisions of the Flood Control Act of June 15, 1936, have not been acquired by the United States. There is no assurance that these necessary flowage rights can be acquired within the limits fixed by the Flood Control Act of June 15, 1936.

The so-called Markham Plan, adopted by the Flood Control Act of June 15, 1936, modifying the Jadwin Plan, so far is merely a paper plan, and there is no assurance that it will ever be actually constructed so as to replace the presently existing Jadwin Plan.

95. Should the Markham Plan as authorized by the Flood Control Act of June 15, 1936, ever become a reality by actual construction, it would have no material effect on the flood menace to petitioner's property because her property would still be in the upper or head end of the Eudora Floodway, protected from diversion of additional, destructive flood waters from the main channel of the Mississippi River only by the same fuse plug levee which now exists.

96. No adequate just compensation to petitioner is possible 409 under the provisions of the Flood Control Act of June 15, 1936, adopting the Markham Plan of flood control on the Mississippi River (Overton Bill). If and when the modifications authorized by the 1936 Act become

effective, the petitioner's property will still be near the head of the floodway, south of the Arkansas River and west of the Mississippi River (the Eudora Floodway).

The 1936 Act authorizes and contemplates the acquiring of flowage rights based on market values at the time such rights are acquired by the United States. The fair market value of petitioner's property was substantially impaired and destroyed when her property was placed in the Boeuf Floodway as a result of the Flood Control Act of May 15, 1928. Values in the vicinity of petitioner's property are now nominal as compared to what they were before being placed in the Boeuf Floodway. Therefore, under the provisions of the Flood Control Act of June 15, 1936, the United States would be authorized to pay, and the petitioner could demand, only the existing nominal values and damages.

Thus the passage of the Overton Bill, conditionally authorizing modifications of the Jadwin Plan, can afford the petitioner no adequate relief, nor secure to her just compensation for her property which had been "taken" by the United States many years before.

The award by the court in the present action will preclude the plaintiff from claiming any additional flowage compensation under the provisions of the 1936 Act.

97. The tentative plans being worked out by the defendant United States, authorized by the Flood Control Act of June 15, 1936, as shown by one of the maps prepared by the Government Engineers filed as an exhibit in the case, include the construction of a spillway at the upper end of the fuse plug levee above Arkansas City, as an entrance to the upper end of the Eudora Floodway at a position in the general vicinity of the petitioner's property, upstream from and near the petitioner's property. Should such a spillway be

410 constructed the petitioner's property would be made to bear the brunt of flooding whenever the upper section of the Eudora Floodway begins to function, just as is planned and authorized by the Flood Control Act of May 15, 1928, for the Boeuf Floodway.

98. The construction of the Markham Plan as contemplated by the Flood Control Act of June 15, 1936, would afford no additional protection to plaintiff's property, but would leave it in substantially the same condition as that under which it now rests. Such modifications of the Jadwin Plan would neither increase its present flood hazards nor give it any further advantage insofar as its flood menace is concerned.



99. The passage of the Flood Control Act of June 15, 1936, (called the Overton Bill, adopting the so-called Markham Plan), has no appreciable effect on the market value of the petitioner's property involved in this action.

100. (a) By Acts of the General Assembly of the State of Arkansas, the plaintiff's property is subject to an annual tax of 30c per acre due the Southeast Arkansas Levee District. The petitioner has paid all taxes and assessments due to the Southeast Arkansas Levee District to the time of trial.

(b) The Southeast Arkansas Levee District was placed in receivership because of default in the payment of its matured bonded indebtednesses by order of this United States District Court for the Western Division of the Eastern District of Arkansas, on February 5, 1932, Mr. Grady Miller being then appointed as Receiver and still serving as such at the date of the trial.

(c) Petitioner's property is also located in the Cypress Creek Drainage District created by Acts of the General Assembly of the State of Arkansas, against which has been charged or assessed a benefit in favor of said Cypress

411 Creek Drainage District in the sum of \$800, payable in annual installments as the result of annual levies. The petitioner has paid on said assessment on her property involved in this action the sum of \$480, being all thereof which has become due. There remains unmatured but outstanding of said assessed benefits the sum of \$320. It is not yet known what proportion of said remainder will be levied and collected by said District.

(d) On January 15, 1930, A. H. Rowell and W. R. Humphrey were appointed by this United States District Court as Receivers for said Cypress Creek Drainage District and remained in charge of the affairs of said District until April 9, 1937, when the affairs of the District were returned to the management and control of its Board of Commissioners by proper order of this United States District Court. At that time its indebtedness had been refunded as the result of a loan made by the Reconstruction Finance Corporation, and the issuance of new bonds resulting in the cancellation of a very large proportion of the then outstanding bonded indebtedness of said Cypress Creek Drainage District.

(e) At the time of the trial there were no past due taxes, assessments or liens of any kind or character against the petitioner's property; and she was the absolute owner in fee simple.

101. The petitioner, Mrs. Julia Caroline Sponenberger, is entitled to recover judgment against the United States in the sum of \$4,000, together with interest thereon at the rate of 6 per cent per annum from January 10, 1929, until paid, and for all costs in this action by her incurred.

412 Whereupon the plaintiff requested the Court, separately presenting each sub-division and each paragraph of each numbered request, separately and severally, to declare the following:

(Conclusions of Law Requested by Plaintiff.)

#### Conclusions of Law.

1. By the passage of the Flood Control Act of May 15, 1928, (Public—No. 931—70th Congress; 45 Stat. 534; Title 33 U. S. C. A., Secs. 702a—702m, inclusive), the Congress adopted a plan of flood control in the alluvial valley of the Mississippi River which involves an intentional, additional, occasional flooding of certain lands in designated floodways, including property owned by the petitioner in the Boeuf Floodway, which constituted a taking of certain property rights of the petitioner for flowage purposes as soon as the Government began to carry out the project authorized. (Hurley vs. Kincaid, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637).

2. One whose lands may be subjected to occasional flooding as a direct consequence of the construction by the Government of a floodway to relieve the channel of a river in times of high water may, as soon as work on the project is begun, maintain an action at law under the Tucker Act against the United States, as upon an implied contract, for such compensation as might have been awarded had condemnation proceedings been instituted by the Government. (Hurley vs. Kincaid, supra.).

3. The Jadwin Plan of flood control is the alluvial valley of the Mississippi River as adopted by the Flood Control Act of May 15, 1928, insofar as it created and established the Boeuf Floodway, became definite and fixed for the first time as a matter of law when the President, pursuant to the authority of Section 1 of said Flood Control Act, approved the Boeuf Floodway and authorized condemnation of land for rights-of-way for the proposed protection levees in the Boeuf basin on January 10, 1929, when the statute of limitation prescribed by the Tucker Act (Jud. Code, Sec. 24 (20); Title 28 U. S. C. A., Sec. 41, Subd. (20), p. (625) first began to run against the petitioner's claim and

cause of action against the United States. (See petitioner's brief in Court of Claims, pp. 130-133 and p. 136).

4. As a matter of law, the taking of petitioner's property became final and irrevocable when the United States filed its condemnation suit in the Boeuf basin on July 1, 1929. The dismissal of that condemnation suit, involving the dissolving of the injunction secured when the suit was filed, long after the petitioner's action had been begun, was too late to affect her rights in the present case. (See *United States vs. Yazoo & M. V. Ry. Co.*, 4 Fed. Supp. 366). When the implied promise to pay has once arisen a later denial by the Government of its liability to make compensation does not destroy the right in contract, nor convert the act into a tort. (*Tempel vs. United States*, 248 U. S. 121, 39 S. Ct. 56, 63 L. ed. 162, at p. 165).

5. Section 4 of the Flood Control Act of May 15, 1928, which provides: "The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River", creates and establishes as a matter of law the right of the petitioner to recover just compensation in her present action.

6. As a matter of law the petitioner, and other property owners similarly situated and likewise affected, prior to the passage of the Flood Control Act of May 15, 1928, had the right to protect her property from floods from the main channel of the Mississippi River by the building of levees or dikes to keep back the flood waters without being responsible to her neighbors or property owners on the opposite side of the stream, a right which was exercised in the construction of the riverside levee which, by the provisions of the Flood Control Act of May 15, 1928, has now become a fuse plug levee at the head or entrance of the Boeuf Floodway. This right of the petitioner was materially impaired, if not destroyed, by the adoption of the Jadwin Plan by the passage of the Flood Control Act of May 15, 1928. (Kincaid vs. United States, 35 Fed. (2d) 236).

7. Riparian proprietors are protected by law from undue interference or burden created by obstructions to the natural flow of rivers by deflections in river's course, or by any other act limiting the right to enjoyment of the natural flow. (Kincaid vs. United States, 35 Fed. (2d) 236).

8. The power of eminent domain in connection with improvements in navigable streams in aid of navigation and for the flood control of navigable streams is complete in the

Federal Government; and cannot be enlarged or diminished by powers of eminent domain of affected States. (Kincaid vs. United States, 35 Fed. (2d) 236; United States vs. Hess, 70 Fed. (2d) 142; Honck vs. United States, 201 Fed. 862; Cape Girardeau, etc. Co. vs. Jordan, 201 Fed. 868; 20 Corpus Juris, p. 530, Sec. 18, and numerous decisions there cited).

9. Under the Flood Control Act of May 15, 1928, (Title 33 U. S. C. A., Sections 702a-702m), and Sections 13, 14, 16 and 17 of the Rivers and Harbors Act of 1899 (Title 33 U. S. C. A., Sections 407, 408, 411-413) made applicable by Section 9 (Title 33 U. S. C. A., Sec. 702i), if conditions of carrying out plans of the Mississippi River flood control will result in diversion of additional flood waters from the main channel of the river in times of flood, the owners of lands over which such waters will flow must be compensated for such flowage rights. (Kincaid vs. United States, 37 Fed. (2d) 602).

10. Where the Government plan of flood control, under the provisions of the Flood Control Act of May 15, 1928, contemplated the diversion through one basin or floodway 415 of more waters than had ever before passed down such basin in times of flood, the diversion of such "additional destructive flood waters" was contemplated, in the meaning of the statute, requiring the United States to acquire by condemnation such flowage rights. (Kincaid vs. United States, 37 Fed. (2d) 602).

11. The fact that the Jadwin Plan of flood control of the Mississippi River provides for raising main levees several feet, so that the capacity of the river will be greatly increased, and it will carry greater volumes of water than ever before, so that actually even less water may be diverted or escape from the river in times of flood than has been the case in the past, does not require the conclusion that no additional waters will be diverted over private lands, nor render it unnecessary under the Flood Control Act of May 15, 1928, for the United States to acquire flowage rights in the designated floodways by condemnation; these statutes contemplating compensation to landowners whose lands were intended to be used as floodways in times of flood, and not that such landowners should bear the whole burden for the benefit of protected lands, such statute having been enacted having in mind conditions as they existed in 1927. (Kincaid vs. United States, 37 Fed. (2d) 602).

12. When the United States departed from its policy of building levees and other public works for the purpose of commerce and navigation alone, and expressly entered the field



of controlling floods for the protection and reclamation of private lands, it engaged in activities which made it responsible under the Fifth Amendment of the Federal Constitution for the invasion of private rights. (Kincaid vs. United States, 37 Fed. (2d) 602).

13. As a matter of law, it will not be assumed that the Congress, by passing the Mississippi River Flood Control Act of May 15, 1928, intended to violate the Fifth Amendment to the Constitution by taking private property for public purposes without just compensation. (Kincaid vs. United States, 37 Fed. (2d) 602).

14. The owner of property subject to overflow waters of either navigable or nonnavigable streams is entitled to have them continue in their natural state, without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation, with appropriate compensation for the private right. (Kincaid vs. United States, 37 Fed. (2d) 602).

15. The owner of land subject to overflow by the Mississippi River had the right to build levees or dykes along the banks of the stream to keep the water off his property, without responsibility to those above or below, so long as he did not change or impede the natural course of the stream; and the legal situation is not changed because the dykes or levees, as increased in height and extended throughout the length of the Mississippi River, were unable to hold the river within its channel at flood stages. (Kincaid vs. United States, 37 Fed. (2d) 602).

16. The appropriation of flowage rights by the United States under authority of the Flood Control Act of May 15, 1928, necessitated compensation, a right of the property owner which was complete with the construction of the work designed to direct the waters on his land, and the right to compensation was not postponed until the lands were actually occupied by diverted waters. (Kincaid vs. United States, 37 Fed. (2d) 602; 49 Fed. (2d) 768).

17. The just compensation to which the owner of property taken for public purposes is constitutionally entitled is the market value of the property at the time of the taking contemporaneously paid in money. (Olson vs. United States, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236).

18. In fixing the compensation to be paid on condemnation of an easement of flowage (or in suit for the recovery of such compensation if no condemnation has been had),  
 417 no reduction is to be made because of diminution of value caused by an unauthorized flooding of the property. (Olson vs. United States, *supra*).

19. The sum required to be paid to the owner of land taken for public use does not depend upon the uses to which he has devoted his land, but is to be arrived at upon just consideration of all the uses for which it is suitable; and the highest and most profitable use for which the property is adaptable and needed, or likely to be needed, in the reasonably near future, is to be considered to the extent that the prospects of demand for such use affects the market value which the property is privately held. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. (Olson vs. United States, *supra*).

20. In considering the uses for which property sought to be condemned (or for which claim for taking is made) is suitable, as affecting its market value, the fact that it may be, or is being, or has been acquired by eminent domain does not negative consideration of its availability for use in the public service, since those having the power of condemnation frequently are actual or potential competitors for rights of way, locations, sites, and other areas requiring the union of numerous parcels held by different owners. (Olson vs. United States, *supra*).

21. To the extent that public demand by prospective purchasers or condemners affects market value, it is to be taken into account in determining the just compensation to which the owner of property is entitled on its condemnation, or suit for its taking. (Olson vs. United States, *supra*).

22. The value of property condemned, or taken, by which compensation to its owner is measured, does not include any element resulting subsequently to or because of the taking. (Olson vs. United States, *supra*).

23. Intermittent overflows of agricultural land in consequence of the construction of flood control works by the United States amounts to a partial taking for which just compensation is required by the Fifth Amendment of the Federal Constitution. (Jacobs vs. United States, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142).

24. Interest on the amount of damage caused by the construction of flood control works authorized by the provisions of the Flood Control Act of May 15, 1928, to lands which will be intermittently flooded in consequence, from the date of the taking of such flowage rights, is a part of the just compensation recoverable by the landowner. (*Jacobs vs. United States*, supra; *United States vs. Creek Nation*, 295 U. S. 103, 55 S. Ct. 681, 79 L. ed. 1331, at p. 1332, 1336).

25. The fact that condemnation proceedings were not instituted by the United States against the petitioner, and that her right to compensation is asserted in this suit by her, does not change the essential nature of the claim. The form of the remedy does not qualify petitioner's right to just compensation as guaranteed by the Fifth Amendment of the Federal Constitution. (*Jacobs vs. United States*, supra).

26. Where the language of an Act of Congress is not clear, the Court is justified in seeking enlightenment from the reports of Congressional Committees and explanations given on the floor of the Senate and House by those in charge of the measure, the legislative history of the Bill, and the testimony of official heads of Departments of the Government given in Hearings before Congressional Committees on the Bill. (*Wright vs. Vinton Branch, etc.*, decided March 29, 1937, 81 L. ed. 487, 491-494; *U. S. vs. Butler et al.*, January 6, 1936—Agricultural Adjustment Act decision; *Savage vs. U. S.*, 1 Ct. Cls. 170; *Robinson vs. U. S.*, 50 Ct. Cls. 159; *Thornton vs. U. S.*, 271 U. S. 414, 46 S. Ct. 585, 70 L. ed. 1013, 1017; *Ariz. vs. Calif.*, 283 U. S. 423, 51 S. Ct. 522, 75 L. ed. 1154, 1165; 22 Corpus Juris, Sec. 1901).

27. As a matter of law, the Congress contemplated, and intended by the language of the Flood Control Act of May 15, 1928, the payment of damages to property owners in the Boeuf Floodway for flowage rights, such as petitioner seeks in the case at bar. (Petitioner's Brief in U. S. Court of Claims, pp. 83-93 and 211-231).

28. The compensation for private property taken for public use must, under the Fifth Amendment of the Federal Constitution, be a full and perfect equivalent for the property taken. The Congress may determine what private property is needed for public purposes, but when the taking has been ordered then the question of compensation is judicial. (*Monangahela Nav. Co. vs. U. S.*, 143 U. S. 312, 37 L. ed. 463; *U. S. vs. New River Collieries*, 262 U. S. 341; 343, 43 S. Ct. 565, 67 L. ed. 1014, 1017).

29. In a strict legal sense, land is not "property", but is the subject of property. Property is entirely the creature of the law. It belongs not to physics but to metaphysics; and is altogether a creature of the mind. Property in a determinate object is composed of certain constituent elements, namely, the unrestricted, exclusive and perpetual right of use, enjoyment and disposal of that object. These rights cannot be materially abridged without, ipso facto, taking the owner's property. Anything which destroys any of these elements to that extent destroys the property itself. The Constitution protects these essential attributes of property. An easement is property. Any regulation which imposes a restriction on the use of the property by its owner, and any public improvement which tends to impair the unrestricted  
 420 enjoyment of property by affecting some right or easement appurtenant thereto may constitute a public use or taking within the meaning of the Constitution. Anything which destroys or subverts the exclusive right to freely use, enjoy and dispose of any determinate objects, real or personal, constitutes a "taking", or destruction pro tanto of property, notwithstanding there is no disturbance of possession or actual or physical invasion of the locus in quo. Petitioners' Brief in U. S. Court of Claims, pp. 93-104 and 239-248).

30. No actual, physical invasion is necessary to constitute a "taking" in the Constitutional sense. Any substantial interference with private property which destroys, or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is a "taking" even though the title and possession of the owner remain undisturbed, and there is no actual, physical invasion of the property. Property is "taken" when any of its proprietary rights are taken of which property consists. That there may be a taking of property without actual physical invasion of it has often been held, and is a well-established legal principal. (Portsmouth Harbor L. & H. Co., vs. U. S. 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287; City of Big Rapids vs. Big Rapids F. M. Co., Mich. 177 N. W. 284, 289; Webster County vs. Lutz, 234 Ky. 618, 28 S. W. (2d) 966; Kincaid vs. U. S., 37 Fed. (2d) 602; Hurley vs. Kincaid, 285 U. S. 95, 52 S. Ct. 267, 76 L. ed. 637; Prairie Pipe Line Co. vs. Shipp, Mo. 267 S. W. 647; U. S. vs. Yazoo & M. V. Ry. Co., 4 Fed. Supp. 366; Jacobs vs. U. S., 45 Fed. (2d) 34; Cooley's Const. Lim. (7th Ed.) p. 818; Louisville & N. R. Co. vs. Lambert, 35 Ky. L. R. 199, 110 S. W. 305; 20 Corpus Juris 666, Sec. 138, and numerous cases cited in foot-notes there found.)



31. The general rule of law is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. The misfortunes or necessity of certain property owners will not justify the shifting of their damages to their neighbor's shoulders. A strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change. (*Pa. Coal Co. vs. Mahon*, 260 U. S. 383, 43 S. Ct. 158, 67 L. ed. 322, at p. 326).

32. Flooding of property is not a "taking" where the property has already been acquired for, and dedicated to, that purpose. Therefore, if, as and when the petitioner's property is actually flooded or invaded for actual flowage by the United States, there can be no other or further recovery by the petitioner. Actual damages for physical invasion are not recoverable against the United States, and such damages are not properly an issue in the case at bar. (*Mullen Benevolent Corporation vs. U. S.*, 290 U. S. 89, 54 S. Ct. 38, 78 L. ed. 192).

33. Compensation in general must be paid to the person who owned the property at the time it was taken or injured, or to one who, prior to the making of the award, had taken a valid assignment thereof from the owner. (20 *Corpus Juris* 847, Sec. 286, and numerous cases there cited; 20 *Corpus Juris*, p. 1186, Sec. 545 and cases cited). The right of compensation is a personal claim, and after it has once accrued does not pass by a deed to the land. (*Lewis, Eminent Domain*, (3d ed.) p. 936, and cases there cited).

34. The permanent law intends that the owner shall be put in as good condition pecuniarily by a just compensation as he would have been if the property had not been taken. No private property may be appropriated to public uses unless a full and exact equivalent for it be returned to the owner. (*Olson vs. United States*, 292 U. S. 246, 254, 255, 54 S. Ct. 704, 78 L. ed. 1236).

35. Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. (*United States vs. New River Collieries Company*, 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1015, 1017).

36. The petitioner's compensation must be based upon the particular manner of construction authorized and stipulated by the Flood Control Act of May 15, 1928. No later modifications can be considered. The plans and specifications

set forth in House Document No. 90 adopted by the enactment of the Flood Control Act of May 15, 1928, are controlling. (Lewis on Eminent Domain (2d ed.) Sec. 712; Lewis on Eminent Domain (3d ed.) 830; East Peoria Sanit. Dist. vs. Toledo P. & W. R. Co., 353 Ill. 296, 187 NE 512, 89 A. L. R. 870, and Annotation; Brainard vs. Clapp, 10 Cush (Mass.) 6, 57 Am. Dec. 74).

37. Because there can be but one assessment of damages for a taking, the rule in condemnation proceedings is that all damages, present or prospective, that are the natural or reasonable incident of the improvement to be made or work to be constructed must be assessed. The rule is that the damages are to be assessed on the basis of the most injurious mode of construction that is reasonably possible under the authorized plan. (20 Corpus Juris 997, Sec. 394, and cases cited; 20 Corpus Juris 763, Sec. 225, and cases cited; Cleveland etc. R. Co. vs. Hadley, (Ind.) 101 NE 473, 45 L. R. A. (N. S.) 796; 2 Lewis on Eminent Domain (3d ed.) Secs. 713, 818, 825, 830, 845, 846; Doty vs. Johnson, 84 Vt. 15, 77 Atl. 866; Mo. R. & L. Co. vs. Creed (Mo.) 32 SW (2d) 783, 30 SW (2d) 605; Jacksonville & S. R. Co. vs. Kidder, 21 Ill. 131; 1 Lewis on Eminent Domain (3d ed.) Sec. 391, and cases cited.)

38. All damages, past, present and future, which naturally or necessarily or proximately arise from the taking, whether they were in contemplation of the parties at the time or not, except those resulting from negligence in the use of the property taken, are conclusively presumed to have been included in the compensation award in the condemnation, or in the suit for the "taking". (Lockhart Power Co. vs. Askew, 110 S. C. 449, 96 SE 685; Hetzel vs. Baltimore etc. R. Co., 169 U. S. 26, 42 L. ed. 648).

39. The petitioner is entitled to have her damages assessed on the assumption of the most adverse flood conditions reasonably possible, the most extreme meteorological conditions reasonably possible, including rainfall, wind, cold and heat, the most extreme flood frequencies, the most extreme flood volumes and repeated rises or crests in the same general flood, and the most extreme flood durations which might reasonably be expected to occur from time to time in the future. Regardless of what use is made by the United States of the Boeuf Floodway in the future under the provisions of existing law, the petitioner can never recover any additional compensation for any damage which may result therefrom. (United States vs. Cress, 243 U. S. 316, 329, 61 L. ed. 746, 749, 752, 753).

40. The just compensation to which petitioner is entitled for the taking of her property involved in this action is the difference between the fair market value of her property before and after its taking. The petitioner's damage for the taking is the difference between the market value of her land free from, and subject to, the flowage rights taken. The petitioner is entitled to recover the decrease in the market value of her property due to the imposition of the public easement thereon created by the Flood Control Act of May 15, 1928..(10 Ruling Case Law, p. 128, Sec. 112; 10 R. C. L., p. 134, Sec. 117; Alabama Power Co. vs. Carden, 189 Ala. 384, 66 So. 596; Emmons vs. Utilities Power Co. (N. H.) 141 Atl. 65, 58 A. L. R. 788; Seattle Mattress & Upholstry Co. vs. Seattle, 134 Wash 476, 236 Pac. 84; Schuylkill Nav. Co. vs. Thornburn, 7 Serg. & R. (pa.) 411; Olson vs. United States, 292 U. S. 246, supra).

41. There being no mandatory or compulsory provision in the present law requiring the United States to repair the fuse plug levee at the head of the Boeuf Floodway when it has crevassed, and the petitioner having no means of compelling the United States to repair any such crevasse when it occurs, any such repair would be purely gratuitous, and might never be made. Therefore, the amount of petitioner's compensation will not be reduced by anticipating that the necessary appropriations will be made by the United States for repairing the fuse plug levee after it has been breached, but her compensation will be fixed as though the Boeuf Floodway will be used after crevasse by all floods exceeding the bank-full stage of the Mississippi River in the latitude of the fuse plug levee. (Old Colony R. Co. vs. Miller, 125 Mass. 1, 21 Am. Rep. 194; 34 Stat. 764, Title 31 U. S. C. A. 627; R. S. Sec. 3733, Title 41 U. S. C. A., Sec. 12).

42. Mere difficulty in assessing damages for a taking is no sufficient reason for refusing to award them where the right to them has been established. (Ball vs. T. J. Pardy Const. Co., 108 Conn. 549, 142 Atl. 855; Hetzel vs. B. & O. Rd. Co., 169 U. S. 26, 42 L. ed. 648).

43. One of the elements to be considered in assessing just compensation to the petitioner is her loss of any increase in market value to her property in the near future and in the natural course of events as an integral part of the growth and development of the alluvial valley of the Mississippi River. (Wetmore vs. Ryner, 169 U. S. 115, 42 L. ed. 682; Olson vs. United States, supra; Conneos vs. Commonwealth, 184 Mass. 541, 69 NE 34; Southern R. Co. vs. Memphis (Tenn.) 148 SW 662 41 L. R. A. (NS) 828; Mills Eminent

Domain, Sec. 173; Lewis, Eminent Domain, Sec. 479; 425 Central Georgia Power Co. vs. Mays, 137 Ga. 120, 72 SE 900; New York etc. Co. vs. Blacker, 178 Mass. 386, 59 NE 1020; McCandless vs. United States, 56 S. Ct. 764; 1 Nicholas, Eminent Domain (1917 ed.) Sec. 219; Belle Fourche Valley Ry. vs. Belle Fourche L. & C. Co., 28 S. D. 289, 133 NW 261; Kansas City R. Co. vs. Bowles, 68 Ark. 533, 115 SW 375; Portland etc. R. Co. vs. Dearing, 78 Me. 51, 2 Atl. 670; San Diego L. & T. Co. vs. Neals, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; Washburn vs. Milwaukee etc. Rr. Co., 59 Wis. 364, 378; Chesapeake & O. R. Co. vs. Allen, (W. Va.), 163 SE 22; United States vs. Chandler-Dunbar, 229 U. S. 53, 57 L. ed. 1063; Duluth etc. R. Co. vs. West, 51 Minn. 163, 53 N. W. 197; Fort Smith & V. B. Bridge Dist. vs. Scott, 103 Ark. 405, 147 SW 440; St. Louis I. M. & So. R. Co. vs. Theodore Maxfield Co., 94 Ark. 135, 126 SW 83, 26 L. R. A. (N. S.) 1111; and cases passim).

44. Among other elements for compensation to which petitioner is entitled is the inconvenience in the future use of her property occasioned by the separating of her property from her adjacent market of Arkansas City by the ring levee which will be built around Arkansas City under the provisions of the Flood Control Act of May 15, 1928, and the resultant impairment of said adjacent market because of the effect of said ring levee on Arkansas City. (Lafin vs. Chicago etc. R. Co., 53 Fed. 415; Chicago - etc. R. Co. vs. Eaton, 136 Ill. 9, 26 N. E. 575; Edmands vs. Boston, 108, Mass. 535; Brainard vs. State, 131 N. Y. S. 221; Putnam vs. Douglas County, 6 Or. 328, 25 Am. Rep. 527; Wilmington etc. R. Co. vs. Stauffer, 60 Pa. St. 347, 100 Am. Dec. 574).

45. Among the additional elements taken from petitioner which are to be considered in the just compensation awarded her in this action are:

(a) Loss of levee protection and probable interference with drainage (United States vs. Chandler-Dunbar Co., 229 U. S. 53, supra; Whitcomb vs. City of Philadelphia, 264 Pa. 277, 107 Atl. 765; Vicksburg etc. Rd. Co. vs. Dillar, 35 426, La. Ann. 1045); and

(b) The increased protection which her land would have enjoyed if the program of the levee and Drainage Districts had not been stopped by the establishment of the floodway created by the Flood Control Act of May 15, 1928. (Kansas City S. Ry. Co. vs. Boles, 88 Ark. 533, supra; St. Louis etc. Rd. Co. vs. Hughes, (Tex.) 73 S. W. 976; Duluth etc. Rd. Co. vs. West, 51 Minn. 163, 53 N. W. 197); and



(c) Loss of advantage of future development and accretion in value (Moore vs. Ry. Co., 78 Wis. 120, 47 N. W. 273; St. Louis I. M. & S. Rd. Co. vs. Theodore Maxfield Co., Supra, 94 Ark. 135, 126 S. W. 83, 26 L. R. A. (N. S.) 1111; Ft. Smith etc. District vs. Scott, 103 Ark. 495, 147 S. W. 440; Kansas City S. Ry. Co. vs. Boles 88 Ark. 533, 115 S. W. 375; Duluth etc. Rd. Co. vs. West, 51 Minn. 163, 53 N. W. 197; El Paso vs. Coffin, (Tex.) 88 S. W. 502; Sullivan vs. Mo. Pac. Rd. Co., (Tex.) 68 S. W. 745; St. Louis etc. R. Co. vs. Hughes, (Tex.) 73 S. W. 976); and

(d) Probable injury to person and property (Telluride Power Co. vs. Burneau, 41 Utah 4, 125 Pac. 399); and

(e) Additional expense of transporting the products of the land to market (Rumsey vs. New York etc. Rd. Co., 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618); and

(f) More difficult accessibility because more difficult ingress and egress because of side protection levees to the floodway as planned (United States vs. Welch, 217 U. S. 333, 30 S. Ct. 527, 57 L. ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680; United States vs. Grizzard, 219 U. S. 180, 31 S. Ct. 162, 55 L. ed. 165, 31 L. R. A. (N. S.) 1135; Rumsey vs. New York etc. Rd. Co., 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618; Weyer vs. Chicago etc. Rd. Co., 68 Wis. 180, 31 N. W. 710).

427 46. If fears and apprehended risks and dangers to property be reasonable, not ill-defined but founded on practical experience, and be the result of intentional and authorized acts on the part of the Government, and if such fears be entertained so generally as to enter into the calculations of all who propose to buy or sell so that the public is frightened from the premises because of the imminence of such threatened and intended dangers with resulting loss of market value, the property owner is entitled to be compensated for such loss. (Portsmouth Harbor L. & H. Co. vs. United States, 260 U. S. 327, 43 S. Ct. 135, 67 L. ed. 287; Ky. Hydro-Elec. Co. vs. Woodard, 216 Ky. 618, 287 S. W. 985; Erazee vs. Ky. Utilities Co., 217 Ky. 424, 289 S. W. 675; Texas Pipe Line Co. vs. Stewart, (Mo.) 35 S. W. (2d) 627).

47. On the issue of loss of market value, all evidence is competent which establishes any fact which would affect the value of the property in the eyes of a purchaser. It is competent to consider every fact and feature and consideration which would influence the general buyer. The exposure of such property to hazards and dangers may be considered, together with all pertinent facts which are the proximate cause of the depreciation of market value to the owner's loss.

No element should be excluded in arriving at the market value of premises which is customary for the business world to consider in determining such market value, or which an ordinarily prudent person would take into account before forming a judgment as to the market value of the property which he is about to purchase. (Ind. etc. Co. vs. Pa. Rd. Co., 229 Pa. 484, 487, 78 Atl. 1039; Snyder vs. The Western Union Railroad Co., 25 Wis. 60; Voigt vs. Milwaukee, 158 Wis. 666, 149 N. W. 392; Brainard vs. State, 131 N. W. S. 221; St. Louis etc. R. Co. vs. Mendoza, 193 Mo. 518, 525, 91 S. W. 65, 66; Little Rock Junction vs. Woodruff, 49 Ark. 381, 5 S. W. 592; Miss. & R. R. Boom Co. vs. Patterson, 98 U. S. 403, 25 L. ed. 206, 208).

428 48. Theory cannot prevail over the established fact. Evidence of sales of land of like character and similarly situated, in the same general vicinity, and not remote in point of time from the alleged taking, is admissible on the question of market values.

The theories of expert witnesses are never to be regarded when they manifestly conflict with the established facts. The mere opinion of experts is not to be allowed to outweigh the positive, corroborated and uncontradicted testimony of unimpeached witnesses to a fact, such as actual sales establishing market values.

Facts are always superior to theory.

(2 Jones, Commentaries on Evidence, (2d) p. 1305, Sec. 698; Kansas City etc. R. Co. vs. Haake, (Mo.) 53 S. W. (2d) 891, 84 A. L. R. 1474; Kelley vs. Cable Co., 8 Mont. 440; Laughlin vs. St. R. Co., 62 Mich 220; People vs. Vanderhoff, 71 Mich. 158; Stone vs. Chicago etc. R. Co., 66 Mich 76; Sanders vs. State, 94 Ind. 147; Treat vs. Bates, 27 Mich 390; and cases passim.)

49. Evidence of market values in counties other than that in which petitioner's property lies (Desha County, Arkansas), and at periods of time remote from the time of the alleged taking of petitioner's property, and evidence of sales the circumstances of which are not shown by the evidence, and the characteristics of the property which is sold not being disclosed by the evidence, is all irrelevant and incompetent, and cannot be considered as tending to show either the loss, or the lack of loss, of the market value of petitioner's property caused by the alleged taking.

The correct measure of compensation to be awarded to the petitioner in the case at bar is the difference between the fair market value of her property immediately before the

alleged taking as compared with its fair market value immediately after the alleged taking, the difference in market value being fixed by the time of the taking and solely because of the alleged taking. (United States vs. New River Collieries Co., 276 Fed. 690, Affirmed 262 U. S. 341, 43 S. Ct. 565, 67 L. ed. 1014; National City Bank vs. United States, 275 Fed. 855, affirmed 281 Fed. 754; United States vs. Inlots, 26 Fed. Cas. 490, 494, affirmed in Kohl vs. United States, 91 U. S. 367, 23 L. ed. 449; Orgel on Valuation under Eminent Domain, (1936) p. 68, Sec. 20; id. p. 112, Seq; id. pp. 463-464, Sec. 137).

50. Because the petitioner was immediately entitled to compensation at the time of the "taking" of her property (Jacobs vs. United States, 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 37, 96 A. L. R. 1; United States vs. Creek Nation, 295 U. S. 103, 55 S. Ct. 681, 79 L. ed. 1331; Seaboard Air Line Ry. Co. vs. United States, 261 U. S. 299, 43 S. Ct. 354, 67 L. ed. 664; Phelps vs. United States, 274 U. S. 341, 47 S. Ct. 611, 71 L. ed. 1083; Brooks-Scanlon Corp. vs. United States, 265 U. S. 106, 44 S. Ct. 471, 68 L. ed. 934), under the circumstances, knowledge, plans, authorities and expectations which existed at the time of the taking, no evidence of changes in plans after the "taking", and especially no developments or changes in plans or modifications after the filing of petitioner's suit, can be considered in awarding petitioner just compensation in this action.

51. The Flood Control Act of June 15, 1936, has no effect upon the petitioner's cause of action; except that Section 2 of said Act is an expressed admission by the United States that the Boeuf Floodway is in operative condition, and that the United States will continue to hold its right to flood petitioner's property for an indefinite period of time in the future as contemplated by the Flood Control Act of May 15, 1928. Section 2 of the Flood Control Act of June 15, 1936, is a ratification and confirmation of the taking of petitioner's property as is alleged in this action.

52. As a matter of law, the United States cannot take advantage of its own wrong by acquiring flowage rights over the petitioner's property under the provisions of the Flood Control Act of June 15, 1936, at values which were impaired or destroyed by the Flood Control Act of May 15, 1928.

The placing of petitioner's property in the Boeuf Floodway by the Flood Control Act of May 15, 1928, destroyed the greater part of its market value. If and when the Act of June 15, 1936, becomes effective, petitioner can be paid under the

provisions of that Act for flowage rights over her property only on the basis of values then existing. These values are now nominal as compared with the market values before the taking of petitioner's property by the United States as a result of the Flood Control Act of May 15, 1928. Thus petitioner can secure no adequate just compensation as required by the Fifth Amendment of the Constitution under the provisions of the Flood Control Act of June 15, 1936.

The award and judgment in this case at bar will preclude and prevent the plaintiff from asserting any additional claim for flowage rights exercised under the provisions of the 1936 Flood Control Act.

53. The program of cut-offs which have been developed in the Middle Section of the Mississippi River since the year 1932, can have no legal effect upon the petitioner's right of action for a taking of her property long prior to the initiation of said system of cut-offs for alleged channel stabilization.

54. As a matter of law, said system of cut-offs was neither contemplated nor authorized by the Flood Control Act of May 15, 1928. (See Doc. 90, Sec. 69, p. 17).

55. When property is taken, its value to the owner is the only strictly relevant value, and market value is acceptable only to the extent that it may be taken as a practical measure of value to the owner. Just compensation is a compensation sufficient to make good the loss of the owner at the  
431 time of the taking. The owner is entitled to the full money equivalent of the property taken, and thereby to be put in as good a position pecuniarily as she would have occupied if her property had not been taken. The petitioner must be compensated for what was taken from her as of the time of the taking. This requirement determines the minimum basis of compensation throughout the entire United States. (Orgel on Valuation under Eminent Domain, pp. 18, 46, 146; United States vs. New River Collieries Co., supra; United States vs. Chandler-Dunbar Co., supra; Omnia Commercial Co. vs. United States, 261 U. S. 502, 63 S. Ct. 437, 67 L. ed. 773; Jacobs vs. United States, supra; United States vs. Creek Nation, supra; Seaboard Air Line Ry. Co. vs. United States, supra; Phelps vs. United States, supra; Brooks-Scanlin Corp. vs. United States, supra).

56. Since January 10, 1929, the United States has had and exercised the complete legal right of supervision and control over the fuse plug levee at the head or entrance of the Boeuf Floodway for the purpose of keeping it as a fuse plug levee



ized by the Flood Control Act of May 15, 1928. (Doc. 90, Secs. 16, 98, 117, 118, 120, and 149; Sec. 9, Flood Control Act of May 15, 1928, Title 33 U. S. C. A., Sec. 702i; 30 Stat. 1152, Title 33 U. S. C. A., Sec. 408; 39 Stat. 950, Title 33 U. S. C. A., Sec. 701; 42 Stat. 1505, Title 33 U. S. C. A., Sec. 702; *Houck vs. United States*, 201 Fed. 862; *Cape Girardeau & T. B. T. R. Co. vs. Jordan*, 201 Fed. 868.

57. Owners of distinct interests in a tract of land taken by the Government for public use, as for instance the respective owners of the fee title, an easement therein or thereover, a mortgage or other lien thereon, or interest therein, have separate rights of action; and may not be forced to pool their interests and have the damages or compensation assessed in a lump sum, and awarded as if the land were  
432 the sole, entire and complete property of one owner.

The Fifth Amendment merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. The question is, What has the owner lost? Not, What has the taker gained? (*Boston Chamber of Commerce vs. City of Boston*, 217 U. S. 189, 54 L. ed. 725, 727).

Persons holding several distinct interests in the same parcel of land may proceed separately to enforce their respective rights. (*A. W. Duckett & Co. vs. United States*, 266 U. S. 149; 45 S. Ct. 38, 69 L. ed. 216, 217; *United States vs. Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. ed. 787, 789; *Wayne County, Ky. vs. United States*, 53 Ct. Cls. 417, affirmed 252 U. S. 574, 40 S. Ct. 394, 64 L. ed. 723; 20 *Corpus Juris* 1187, and numerous cases there cited in footnotes 16 and 17).

Two or more persons having distinct causes of action, although against the same defendant, may not join as plaintiffs in one suit, and it is immaterial that the causes of action arise out of the same transaction, or that they are kindred and dependent upon similar facts. (47 *Corpus Juris*, p. 56, Sec. 115, and cases cited in footnotes).

58. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in her pleadings. (*Chicago B. & Q. Ry. Co., vs. Willard*, 220 U. S. 413, 55 L. ed. 521, 526, and numerous other decisions there cited).

A plaintiff has the right to prosecute her suit to final decision in her own way. The plaintiff may select her own manner of bringing her action. The plaintiff may elect her own

tion, bill or complaint is to determine the character of the controversy. (Chicago B. & Q. Ry. Co. vs. Willard, supra).

59. The fact that claimant's interest is less than the whole property does not affect her right to compensation for the property taken or damaged. (20 Corpus Juris, p. 653, Sec. 130, and cases cited; Olson vs. Seattle, 30 Wash. 687, 71 Pac. 201; St. Louis etc. R. Co. vs. Pfennighausen, 7 Ind. T. 685; and other decisions passim).

60. Neither the Southeast Arkansas Levee District, the Cypress Creek Drainage District, the Receiver for either of said Districts, the Trustees for the bondholders of either of said Districts, nor any of the other parties to this action have any interest in the petitioner's cause of action against the United States as the same is alleged in her own petition. (Authorities hereinbefore cited).

If the defendant, the United States, desired to have the entire title to the land adjudicated, together with every interest therein and claim thereon, and to have had the just compensation awarded in one lump sum, it should have brought condemnation proceedings against the petitioner's land as is authorized by the provisions of Section 4 of the Flood Control Act of May 15, 1928, naming as parties defendant whomsoever it desired. In that event the United States would have been the plaintiff, which would have entitled it (rather than the petitioner) to have declared its own cause of action, and to have prosecuted its such suit (condemnation proceedings) to final decision in its own way, naming as parties defendant whomsoever it desired.

61. As a matter of law, under the evidence in this case, the petitioner is entitled to judgment against the defendant, the United States, in the sum of \$4,000.00, together with interest thereon at the rate of 6% per annum from January 10, 1929, until paid, and for all her costs incurred in this litigation.

62. Costs are properly allowed against the United States in a suit brought under the Tucker Act. (United States vs. Cress, 243 U. S. 316, 330, 61 L. ed. 746, 754).

Whereupon, the defendant, separately and severally, requested the Court to make the following

(Findings of Fact requested by Defendant.)

#### Findings of Fact.

1. "The project for the Flood Control of the Mississippi River in its alluvial valley, and for its improvement from the

Head of Passes to Cape Girardeau, Mo." was authorized by the Act of May 15, 1928, c. 569; 45 Stat. 534.

### The Alluvial Valley

2. The alluvial valley of the Mississippi River within which is included the lands of plaintiff is tersely described in the opinion delivered by Justice White in *Jackson v. United States*, 230 U. S. 3 to 5, L. C. as follows:

"The Valley of the Mississippi River, may in a broad sense be said to commence at Cape Girardeau, Missouri, and to extend from there to the mouth of the river at the Gulf of Mexico. The river, however, in its course to the ocean does not run through the center of the vast fertile and alluvial plains which in a comprehensive and generic sense constitutes the delta of the Mississippi. On the contrary, the situation of the river in this respect varies, occasioned by the fact that [a] divers places the upland or hill country approaches to or constitutes the bank of the river. The difference in this regard is marked between the west and the east banks. The west bank is divided into four great basins—The St. Francis Basin, which extends from Cape Girardeau to Helena; The

435 White River Basin, which extends from Helena to the mouth of the Arkansas; The Tensas Basin, which extends from the mouth of the Arkansas to the mouth of the Red River; and the Atchafalaya Basin, extending from the mouth of the Red River to the Gulf. Practically in the long sweep from Helena, where St. Francis Basin ends and the White River Basin begins, to the ending of the Atchafalaya Basin at the Gulf there is no real topographical distinction between the basins, the west bank of the river in that great distance consisting of alluvial country having generally a very wide though varying expanse. The division into basins putting out of view the St. Francis Basin, is therefore merely the result of a consideration of the watershed of each basin, all the water, however, from each ultimately finding its way to the Gulf of Mexico, either through the Mississippi River, or in the lower basins in part at least by the means of streams flowing independently of the Mississippi River to the Gulf of Mexico. On the east bank the situation is different. In the long stretch from Cairo, Illinois, to a point a short distance below Memphis, generally speaking, the hills and uplands border the river and constitute its bank. From the point below Memphis to which we have referred to Vicksburg, Mississippi, this is not the case, and there is a great basin known as the Yazoo Basin, which, aside from peculiarities of its own, may be said to possess the same general char-

acteristics as the basins on the west bank of the river. From Vicksburg where the uplands come to the river and constitute its bank, down to Baton Rouge, Louisiana, where the hills or uplands permanently recede from the river a different condition from that which exists on the west bank obtains."

3. This division of the alluvial valley is recognized in the report of the Chief of Engineers, *supra*, in the following manner:

"The alluvial valley of the river may be considered in three principal sections: the northern, comprising the St. Francis Basin on the west side of the river; the middle, including the Yazoo Basin on the east and the Tensas Basin on the west, running on the east from near Memphis to Vicksburg and on the west from the Arkansas River to the Red River; and the southern, or Louisiana section, from the Red River to the Gulf of Mexico." (H. D. 90, Section 12).

"Flood control must therefore be considered in three sections, the northern section from Cape Girardeau to the mouth of the Arkansas, the middle section from the mouth of the Arkansas to the Red; and the southern section from the Red to the Gulf through the main stem of the Mississippi and the Atchafalaya." (House Committee Document #1, 74th Congress, First Session, Section 5).

4. The middle section is thus divided in the reports into the eastern and western sections. The western section including the Tensas Basin wherein the Boeuf floodway, so called, is situated and is separate and apart as a distinct entity from the eastern part of the middle section which includes the Yazoo Basin as well as the northern and southern sections.

#### Action By Congress.

5. Congress did not enact into law all of the suggestions made by Gen. Jadwin in House Document 90, (Oliver 1253) but did adopt the engineering plan, in the manner following: "The project for the flood control of the Mississippi River in its alluvial valley and for the improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document 90, 70th Congress, First Session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers,



437 . . . . . provided that all diversion works and out-  
lets constructed under the provisions of Sections 702a  
to 702m (U. S. C. A.) or Sec. 704 of this title shall be  
built in a manner and a character which will fully and amply  
protect the adjacent lands: Provided further that pending  
completion of any floodway, spillway, or diversion channel,  
the areas within the same shall be given the same degree of  
protection as is afforded by levees on the west side of the  
river contiguous to the levees at the head of said floodway  
..... (702a U. S. C. A.)

6. Paragraph No. 2 of Section 3 of said Act provides:

“No liability of any kind shall attach to or rest upon the  
United States for damages from or by floods or flood waters  
at any time: provided, however, that if in carrying out the  
purposes of Section 702a to 702m of this title it shall be  
found that upon any stretch of the banks of the Mississippi  
River it is impracticable to construct levees either because  
such construction is not economically justified or because such  
construction would unreasonably restrict the flood channel  
and lands in such stretch of the river are subjected to over-  
flow and damage which are not now overflowed or damaged  
by reason of the construction of levees on the opposite bank  
of the river it shall be the duty of the Secretary of War and  
Chief of Engineers to institute proceedings on behalf of the  
United States Government to acquire the absolute owner-  
ship of the lands so subjected to overflow and damage or  
floodage rights over such lands. (Section 702c U. S. C. A.—  
Section 3 Act of May 15, 1928).

### The Engineering Plan.

7. This plan was set out in detail in the Report of Gen.  
Jadwin, Chief of Engineers, to the Secretary of War, and by  
him submitted to the President of the United States and  
thence by Executive Message to the Congress of the United  
States on the 8th day of December, 1927, and because House  
Document 90, 70th Congress, First Session. The plan  
438 thus submitted is referred to as the Jadwin Plan, so  
named after its official sponsor and co-author. This  
report of General Jadwin published as House Document 90  
embraced both the engineering plan for flood control of the  
Mississippi River, an elucidation thereof as well as sugges-  
tions for its operation. The plan is referred to and de-  
scribed by the report as “a comprehensive one, providing for  
the maximum flood predicted as possible, and for future ex-

pansion to meet changing conditions. It includes a spillway above New Orleans, diversion floodways in the Atchafalaya and Tensas Basins, a river bank floodway from Cairo, Illinois, to New Madrid, Missouri, together with strengthening and a moderate raising of existing levees. It is designed to prevent any material increase in flood stages. Channel stabilization and navigation improvement are included." (H. D. 90, supra, pg. 3).

8. The Engineers' Report (H. D. 90, supra) further explains the general plan stating: "The plan has been drawn to reduce to a minimum the damages to land and structures resulting from the flow at high water through the floodways. All property affected lies in the natural high water bed of the river. Much of this land was transferred to the States by the Swamp Act approved September 28, 1850." All this land was then subjected to the servitude of flooding. "The purpose of this Act (Swamp Act) was to enable the States to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein. . . . Moreover, the lands with some exceptions will have the same protection as is afforded by the present levee system, a protection provided partly at the expense of the Federal Government. The exceptions are the lands in the Bonnet Carre floodway and in the setback floodway from Birds Point to New Madrid." (H. D. 90, supra, Section 32).

9. " . . . . . The excess must be spilled through safety valves when the volume exceeds the safe capacity of the river. These safety valves consist of one control spillway, several relief or fuseplug levees at present levee grade and one levee of reduced height, all emptying into natural floodways wholly or partly leveed." (Section 97)

10. "To prevent failure from causes other than topping and bank caving, the cross sections of levees must be enlarged. The section to be used will be ample to include the line of saturation and will vary with the materials and foundations in different localities. The maximum will generally be river slope 1 on 4, crown 12 feet wide, landside slope about 1 on 6. The levees generally will be raised about 3 feet, so that the selected weaker relief levees will be at about the elevation of the present levee top and will surely serve their purpose." (Sec. 98)

11. "The plan is designed to protect against the greatest flood predicted as possible, all the land in the Delta except the limited areas subject to backwater and within leveed flood-

rays. The land within the floodways will be protected against any recorded flood that has occurred except that of 1927 and possibly that of 1912 and 1882." (H. D. 90, supra, p. 99)

12. "The plan also includes an extension of revetment of the banks of the river, to reduce the danger of attacks on the foundations of the levees and their destruction by caving banks, thereby to further reduce the possibility of crevasses and to stabilize the position of the river in order that contraction or regulation works may be provided, to assist in securing and holding the low water channels needed for carrying the commerce of the valley in low water as well as in high." (Sec. 21 H. D. 90)

13. Channel stabilization both for flood control and navigation are likewise a part of the general adopted project (H. D. 90 pg 3) Channel stabilization was explained in the report, supra, in the following manner:

14. "Channel stabilization—Since the levees within the limits of this project are to be greatly enlarged, they will be much more expensive than heretofore, so something must be done to avoid the frequent moving of them from the proximity of caving banks. In addition, the river cannot be regulated for low water navigation until the banks are made stable, this both to keep the channel in one place and to stop the enormous dumping of earth into the river by bank caving. A general bank-protection scheme must be carried out that will consist of revetting banks by proven methods and in addition trying new and cheaper methods to accomplish the same results. At the same time regulation of the kind which has been successfully accomplished above Cairo will be undertaken below when and where the banks become stable. The plan includes a ten year program of channel stabilization and river regulation at a total cost of one hundred and ten million dollars or eleven million dollars per year. This program may need revision upwards after some years, as the rate and total amount of work above contemplated is a minimum." (Section 131—Mathis, 1114 and pages following)

#### Plan For Boeuf Floodway.

15. This plan established a floodway in the western section which was designated as the Boeuf Floodway, and is described in the official report, supra, as follows:

16. " . . . . A floodway for excess floods is provided down the Boeuf River on the west side of the river. . . . "

The entrance to the floodway is closed by a safety plug section of the levee at present grade, which is located at Cypress Creek near the mouth of the Arkansas. To insure their safety until this section opens, the levees on the Mississippi from the Arkansas to the Red will be raised about three feet. To prevent flood waters from entering the Tensas Basin except into the floodway during a high flood, the levees on the south side of the Arkansas will be strengthened and raised about three feet as far upstream as necessary." (H. D. 90, supra, Section 16).

441 17. "To insure that excess water will leave the main river a fuse plug section in the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, namely, three feet below the new levee grade. \* \* \* In order to limit the land in the Tensas Basin overflowed by it, levees will be constructed on each side of the Boeuf River bottom, where natural ridges do not serve, from the Cypress Creek levee to back-water in the lower Tensas Basin. (These levees have been referred to in the testimony as guide levees.) Arkansas City is to be inclosed with a levee. \* \* \* " (H. D. 90, supra, Sec. 118).

18. As a matter of comment and explanation to this part of the plan, the report described it as follows:

19. "The Boeuf river bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land. Water will not top the Cypress Creek fuse plug levee and go down the floodway until it is so high that it must find an outlet. No flood except that of 1927 has reached such a stage. \* \* \* The lands in the floodway will be inundated only by floods that would overtop the present levee system and they will retain the same measure of protection as they now have." H. D. 90 supra, Section 119). The proof shows that the Boeuf Basin has always been a floodway.

20. "The guide levees heretofore referred to as such and as a part of the plan were never definitely located as an engineering fact." (Davis, 904-905). But suggested locations, however, appear for explanatory purposes on Map 2 attached to H. D. 90, supra, and on defendant's Exhibit #55. (Mathes, 1114-1120).

21. These guide levees began at the upper end of the suggested spillway just below Rohwer on the river bank or an alternate selection originating at or near Amos and extend-



ing to the vicinity of Doss and looping north to Col-  
 12 linston and with a ring levee around the city of Mon-  
 roe. This was to be the west guide levee. The east  
 guide levee beginning at a point in conjunction with the riv-  
 er side levee at or near Luna Landing running thence in a  
 southerly direction a short distance below Chicot. Thence  
 taking up again at a point further south near Terry and then  
 extending in a southwesterly direction to Alto, thence verging  
 off in a southeasterly direction to a point at or near Peck.  
 The designed fuse plug being between a point just south of  
 Rohwer and extending along the west bank of the Mississippi  
 river to Luna Landing, this being designated as the entrance  
 to the Boeuf spillway. Rohwer is approximately 19.7 miles  
 by river below Yancopin which is close to the junction of the  
 Arkansas and the Mississippi Rivers. Luna Landing is ap-  
 proximately thirty-three miles by river below Rohwer, from  
 Luna to Vacluse—eight miles. The project called for the  
 raising of the levees along the south bank of the Arkansas  
 to the 1928 grade, corresponding to 63.5 on the Arkansas City  
 gauge, the 1914 grade being 60.5, and from Yancopin to Roh-  
 wer about the same, leaving the territory between Rohwer  
 and Luna Landing at the same height as it now exists. That  
 is to say, it was not a part of the project to raise any portion  
 of the levee.

22. The lands of the plaintiff in this action lie in Desha  
 County, Arkansas, about two miles west of Arkansas City on  
 the Mississippi River, the land lying in what is known as the  
 Boeuf Basin, or in the basin of the Boeuf River which has its  
 source in the northern section of Desha County and flows  
 south, enters into the Ouachita River in Louisiana, forming a  
 natural basin between Macon Ridge on the east, and the high-  
 lands on the west. Boeuf Basin has always been a natural  
 roadway for Mississippi water from the Mississippi River on  
 the east and the Arkansas and Flat Rivers to the north.  
 Plaintiff's land and other land similarly situated have  
 23 been repeatedly overflowed by deep high water and  
 never have been entirely free from overflow notwithstanding  
 the construction of good strong levees. (Citations:  
 Neptune 172, 173; Sponenbarger 381; Thompson, 395, 597,  
 5; Parker, 619, 650; Courtney, 717).

23. In 1927 a general flood of the tributaries of the Missis-  
 sippi River and all the Mississippi Basin including the Arkan-  
 sas and White Rivers caused a flood that was unprecedented  
 in the memory of living man according to official records, and  
 was the greatest in the whole section for more than a hundred  
 years. This flood inundated the land of the plaintiff and all

other lands similarly situated to a depth of fifteen to twenty feet according to witnesses, and including the town of Arkansas City, causing a general devastation in that area and the loss of livestock, improvements and other damage. (Citations: Neptune, 223, 224; Thompson, 493, 494, 495, 521, 527; Parker, 616, 648, 650; Zellner, 704; Courtney, 717; Matties, 771; all plaintiff's witnesses. See also photographs of Arkansas City taken during the flood of 1927 and filed as exhibit.)

24. After the destructive flood of 1927, the Chief of Engineers, Major General Edgar Jadwin, made a report to the Secretary of War covering the result of a study of the subject of flood control along the alluvial valley of the Mississippi River front, and having for its purpose the recommendation of a plan that would reduce the hazards and loss from destructive floods along the Mississippi River and its tributaries. The work and improvement was to be divided into three distinct sections; one, the northern; two, central or middle; three, the southern. Each of these sections was to come under a separate, distinct, and well defined plan peculiar each to the section so to be protected. Plaintiff's land

and land similarly situated all would be in the central  
444 middle section which comprises that part of the Mississippi Delta lying between the mouth of the Arkansas River on the north and the Red River in Louisiana on the south. At the time of the passage of the Flood Control Act of May 15, 1928, there stood a line of levees along the Mississippi and south of Arkansas River including the Cypress Creek levee. These levees had been constructed under the Levee District system, paid for by the land owners in this area. These levees were built to the 1914 grade. It had been found and was so reported in the letter of recommendation of General Jadwin that the waters south of Arkansas could not be controlled by levee. It was therefore recommended that the levees south of Arkansas City be raised three feet and the remainder left at its present grade.

25. The so called Boeuf floodway was a separate and independent project provided for by the engineering plan adopted by Congress in the Act of May 15, 1928, Chapter 569, and no work has been done within said area as part of the construction program for the creation thereof in accordance with the plans aforesaid and as had been suggested by the letter of General Jadwin to the Secretary of War. (Citations: Matthews, 820; Cain, 900, 905; Holland, 979).

26. Congress by the adoption of the Act of June 15, 1936, abandoned that part of the flood control project of 1928 in

so far as it affects the Boeuf Floodway and in lieu thereof has created the Eudora Floodway as a substitute for the so called Boeuf Floodway (Citations: Davis, 900-905; Moore, 920; Matthes, 1149; Holland, 977-978; Seybold, 1328) and the Chief of Engineers through his duly constituted agents and employees are now engaged in the taking of options on land and easements within the said proposed Eudora Floodway as provided for by the Act of 1936 creating same. (Citations: Matthes, 1189, 1243; Seybold, 1328, 1339, 1353, 1342, 1343).

445 27. Although the Flood Control Act of May 15, 1928, which adopted generally the engineering plan proposed, provides for a floodway down through the Boeuf Basin and for a fuse plug at the head thereof and further provides for the construction of guide levees therein, within which plaintiff's lands are located, the Court finds that no work was ever commenced on the construction of said floodway and that nothing has been done toward the prosecution of such a plan, or the construction of such guide levees, and that plaintiff has at all times continued to exercise her rights of ownership and dominion over her said lands and has operated her farm and has secured loans thereon and the United States Government has not committed any act which amounts in law to a taking of any part of her property. (Citation: Matthes, 1200; Seybold, 1343; Davis, 900, 905; Moore, 920).

28. Although Section 1 of the Act of May 15, 1928, adopted the Engineering Plan as set forth in House Document 90 this same section nevertheless makes certain exceptions and provisions which act as a restriction upon the full adoption of the plan as submitted by General Jadwin. The Mississippi River Commission had likewise made suggestions for a plan for flood control and Congress provided in the manner following, quoting from Section 1:

29. "Provided that a Board to consist of the Chief of Engineers, the President of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President by and with the advice and consent of the Senate . . . is hereby created and such Board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary to recom-  
446 mend to the President such action as may be deemed necessary to be taken in respect to such engineering

differences and the decision of the President upon all recommendations or questions submitted to him by such Board shall be followed in carrying out the project herein adopted . . . . . Such project and the changes therein if any, shall be executed in accordance with the provisions of Section 702h of this title."

It is clear, therefore, that the Flood Control Act was only an enabling Act. It constituted an expression from Congress authorizing and delegating authority to constituted commissions and engineers and the Secretary of War to proceed in the execution of a flood control system, as in their judgment would nearest approach the accomplishment of the herculean task of controlling the Mississippi River floods and afford maximum protection to the residents and property in the alluvial section. The Jadwin Report appearing in House Document 90 was therefore only tentative in its character subject to change. It was but a mere outline or a suggestion to Congress or a general scheme of flood control within the alluvial valley. In the words of General Jadwin himself this is explained:

"The plan herein recommended is general in its scope. It is recommended that the responsibility for the execution of the plan, the details of the design, and the location of the engineering works, and structures be placed upon the Chief of Engineers under the supervision of the Secretary of War as is done by Act of Congress in the case of River and Harbor Improvements." (Letter of Transmission, House Document 90, 70th Congress, First Session, Section 139.)

30. As a result of work done under authority of Congress expressed in the said Flood Control Act of May 15, 1928, the river has been shortened one hundred miles between Arkansas City and the Old River by cut-offs and the bed of the river has been lowered by dredging and this work is still in progress. (Citations: Matthes, 1121, 1130, 1137, 1160, 1140, 1147) The greatest improvement that has resulted is shown in the vicinity of Arkansas City and the fuse plug. (Matthes, 1147) As a result of these cut-offs, the height of the river has been lowered five or six feet as was shown by the flood of 1937. (McGehee, 925; Matthes, 1147) During the flood of 1937 approximately two million cubic feet of water per second came down the main channel of the Mississippi River, but left a freeboard on the levees of three feet to five feet. It was therefore found that in view of the effect of the cut-offs it would not have been necessary to raise the levees in the first instance as they



would have carried all the water that came down the river without overtopping. (Matthes, 1179) As an additional result of the dredging and cut-off work, a flow of two million feet per second in the channel of the Mississippi and an additional flow of one million two hundred thousand cubic feet per second from the Arkansas and White Rivers could now be carried safely by the fuse plug levee.

31. The adopted plan of the Flood Control Act of May 15, 1928, has been by subsequent legislation and acts of Congress modified and changed especially as relates to the Boeuf Basin, and the plan as then adopted has been abandoned and no longer is considered a part of the plan of flood control in the western part of the middle section of the alluvial valley. (Citation: Davis, 900, 905; Moore, 920; Matthes, 1149; Seybold, 1328, 1343; Holland, 977, 978).

32. The Chief of Engineers acting within the scope of his authority delegated by the Act of Congress established the various cut-offs and engaged in corrective dredging of  
448 the channel heretofore set out, as an aid of flood control as well as an aid of navigation and the improvement of the Mississippi River from the Head of Passes to Cape Girardeau, and these cut-offs have materially reduced the flood crest in time of high water and have aided in the escape of such flood water thereby permitting the passage thereof by the gauge at Arkansas City at a very material reduction in said crest from that which had existed theretofore, prior to the construction and operation of said cut-offs. (Citation: Neptune, 200, 201; Matthes, 1140, 1148, 1176; Morris, 1285; Clemens, 1369, 1385).

33. During the flood of 1929 there was a flow of a million, eight hundred thousand cubic feet per second down the main channel of the Mississippi River; and the gauge at Arkansas City had a reading of 58.8 feet. In the flood of 1937 there was a flow of two million, one hundred thousand cubic feet per second with a gauge at the same place of 53.8 feet or a gauge reading of five feet less water with a flowage of three hundred thousand cubic feet more water at the same place. (Citation: Neptune, 200, 201; Matthes, 1140, 1148, 1176; Morris, 1285.) There was a twenty per cent greater flow past Arkansas City in 1937 than in 1929 with a five foot lower stage. (Morris, 1285)

34. The lowering of the gauge of the river at Arkansas City five feet as shown by the flood of 1937 from the gauge as registered at that place in 1929 in spite of the fact that an excess of three hundred thousand cubic feet per second more

water was discharged in 1937 than in 1929, is a result of work done by the Engineering Force under authority and direction of the Flood Control Act of May 15, 1928; and the strengthening of the channel, revetment work and dredging as testified to were designed and intended to aid in channel stabilization and in aid of navigation and flood control and for the more rapid escapement of flood water at a reduced elevation than existed prior to their construction in [in] channel  
 449 stabilization, flood control, and navigation. Such constructing of the cut-offs, strengthening of banks, revetments, and dredging as aforesaid has enlarged and improved the flood channel carrying capacity of the main river and a reduction of crest flow at all times, thereby materially reducing the flood heights along the fuse plug section of the levee. This work has afforded additional protection to the land of the plaintiff and land similarly situated. (Citation: Matthes 1139, 1140, 1156, 1179; Seybold, 1328; Clemens, 1386)

35. The reconstruction of the levees on the south bank of the Arkansas River between Pine Bluff and Yancopin by the United States Government was done because the crevassing of said levees by the 1927 high water on the Arkansas River; and the raising of said levees was within the purview and discretion of the Mississippi River Commission, independent of the Flood Control Act of May 15, 1928, and the same was done in order to afford additional protection to the territory which has been overflowed by the 1927 flood; and by such levee construction to said area just now received more protection than theretofore enjoyed. However, in the 1927 flood the levees on the south bank of the Arkansas River were inadequate and insufficient to protect the inhabitants throughout the Boeuf Basin from excessive water that might occur within the Arkansas River. (Citation: Oliver, 1249, 1257; Morris, 1290, 1291, 1292)

36. The building and improvements on the plaintiff's lands were destroyed by the flood of 1927 and prior to the passage of the Flood Control Act of 1928, and the property of plaintiff has been subjected to flood waters when the river reached high stages upon determined length of time and flood waters flowed over the lands of plaintiff in the years 1912, 1913, 1919, 1921, 1922, and 1927, and the flood waters of 1935 would have flooded plaintiff's property but for the flood control levee erected by the United States Government in  
 450 replacing and repairing the levees of the Arkansas River at the points known as Medford and Pendleton. (Citation: Simons, 305; Morris, 1290, 1292)

37. All improvements upon lands located immediately behind levees along the main stem of the Mississippi River including those of plaintiff are at all times of the flood stages of the river subjected to extreme hazards, and any such improvements so located are liable at any time to be inundated and destroyed by the breaking of said river front levee and by natural crevassings that may occur due to the action of such flood water, and the construction of a river front levee on the main stem of the Mississippi River, regardless of their height and strength is at all times subjected to the same hazard of the natural consequences of the action of the water thereon and such properties have no assurance against any devastating overflow; moreover, it is impossible to predict accurately what stages the river flood may reach. (Citation: Neal, 712; Courtney, 717; Moore, 921; Dabley, 948; Meador, 1011; Kopps, 1009)

38. Land values generally declined in every locality during the early twenties and then experienced some renewal of strength until 1928. From then the market showed a general weakness until it completely collapsed in 1930 and only showed some evidence of revival in 1934. Plaintiff's land and land similarly situated, in addition to feeling the effects of the general depression in real estate value, were burdened with heavy improvement taxes, including levee, drainage, road and special school taxes. But only one-fifth or one-fourth of these lands being in cultivation and revenue producing these taxes were an additional burden on the total acreage of any individual ownership. These heavy tax burdens coupled with the low price of cotton, the principal money crop of that section, resulted in heavy forfeitures, all of which tended to destroy land values and all market  
451 for land. This condition existed prior to the passage of the Act of May 15, 1928, commonly known as the Flood Control Act. (Citation: Matthews, 802; Caine, 834, 839; Moore, 913, 914; McGehee, 926; Dabney, 942; Farrell, 981; Meador, 1016; Drew, 1044)

39. That in spite of the flood of 1927 and the almost confiscatory tax burdens these lands bore, loans were made upon these lands in the Boeuf Basin, including the lands of plaintiff and other lands similarly situated. (Citation: Pre-wett, 723; Caine, 834, 845)

40. No proof has been offered by plaintiff that she has been unable to make a sale of her property since the passage of the Flood Control Act of 1928 or that she has made any attempt to make a sale of her property, but if the plaintiff has been unable to make a sale or negotiate loans on her said

property and the land value has been reduced, it has not been due to any act on the part of the United States that would amount in law to a taking, but has been wholly due to a multiplicity of causes including the destructiveness of the flood of 1927, the general depression following that flood, and to excessive taxes both general and special within the State. (Citation: Matthews, 802; Caine, 834 to 839; Davis, 881; Moore, 914, 913; McGehee, 926; Dabney, 942; Farrell, 981; Meador, 1016; Gould, 1000) But it is further found by the Court that in spite of the flood of 1927 and the general depression and the burden from taxes, land in the vicinity of plaintiff's land has been sold and loans have been made thereon since the passage of the Act of 1928, and that the sale and loan values of land have not been destroyed. (Citation: Sponenbarger, 383-385; Thompson, 593-594; Prewett, 723; Bailey, 1064-1074; Exhibit #47; Holland, 966)

41. In addition to the fact that land in the vicinity of plaintiff's land described in her complaint maintained a sale and loan value after the passage of the Flood Control Act of May 15, 1928, (Bailey, 1064, 1074; Exhibit #47; Holland, 966) plaintiff has herself repeatedly borrowed money upon the security of her land described in her complaint in this case since the passage of the said Flood Control Act of May 15, 1928. (Sponenbarger, 383, 385; Thompson, 593, 594; Prewett, 723)

42. Any depreciation in the market value of plaintiff's land from the price level of 1926 has not been due to the passage of the Flood Control Act of May 15, 1928, nor has it been the result of any action on the part of the defendant government through its officers, agents, or employees, but on the contrary is due to a multiplicity of causes, namely: the general depression, burdensome taxes, the low price of cotton, and the flood of 1927. (Citation:—Prewett, 723; Matthews, 807; Cone, 833-835; Davis, 880-895; Moore, 910, 911, 913, 914; McGehee, 926; Dabney, 942; Holland, 966-969; Bailey, 1064, 1074; Exhibit #47)

43. There is no proof nor has the plaintiff attempted to show that she has been molested in the possession of her property, or that her possession has been interfered with, in the exercise of her right of ownership, nor has the United States, its agents, officers, or employees, committed any act or deed that would amount to a taking of any part of her property; but on the contrary she has remained in the continuous, notorious, uninterrupted and peaceful possession of her property, enjoying all of its fruits and advantages, and has continuously operated her farm and collected the pro-



ceeds of the crops thereon, and used same as collateral for loans; and the damages claimed, if any, are wholly speculative, consequential, and anticipatory. (Sponenbarger, 379; Thompson, 598, 601; Parker, 638, 651)

44. The United States Government, its officers and agents entrusted with the carrying out of the Flood Control Act have not diverted or caused to be diverted any excessive flood waters from the main channel of the Mississippi River to the so called Boeuf fuse plug and into the so called Boeuf Floodway or the Tensas Basin. The property of plaintiff and those similarly situated is not subjected to any additional servitude from excessive flood waters than existed prior to the passage of the Flood Control Act of May 15, 1928. (Citation: Sponenbarger, 379; Hopson, 473; Thompson, 598, 601; Parker, 638; Davis, 886; Wonson, 272; Simons, 320, 321; Neal, 713)

45. The United States Government has in no wise interfered with the Cypress Creek Drainage District or with any other drainage system that affects plaintiff's land and lands similarly situated but that said land in said district enjoys the same benefits from the drainage systems constructed therein as it did prior to the Flood Control Act of May 15, 1928; and the United States has in no wise interfered with or changed in any manner the operation of said drainage system and the property within said district now enjoys the same benefits from said drainage system as when the same was created in so far as any interference by the United States therein is involved.

46. Whereas plaintiff's land and other lands similarly situated were repeatedly subject to overflow prior to the passage of the Act of May 15, 1928, they have at no time since the passage of said Act been overflowed by additional destructive flood waters that passed by reason of diversion from the main channel of the Mississippi River nor have such lands been at any time inundated by any act or project or carried out by the United States since the passage of said Flood Control Act.

47. Notwithstanding the fact that since the passage of the Flood Control Act of 1928 there have been three great floods on the Mississippi River, namely, 1929, 1935, and 1937, plaintiff's lands and other land similarly situated have been free from overflow or from any water that overflowed their land as a result of any flood on the Mississippi or as the direct or indirect result of any work done under the authority of said Act of May 15, 1928. (Citation:

Wonson, 272; Sponenbarger, 372; Simons, 320, 321; Neal, 713)

48. The plaintiff's property at the time of the alleged taking as set out in her petition and since that date has had the same protection on the main stem of the Mississippi River as it enjoyed prior to the passage of the Flood Control Act and has been afforded better protection and security than theretofore existed by reason of increased levee protection on the south bank of the Arkansas River; and in addition thereto the work done under the authority of the Flood Control Act of 1928 at other localities than in the so-called Boeuf Floodway, has in no wise changed, altered or reduced the levee protection to plaintiff's property and other property similarly situated within the Boeuf Basin nor has it in any wise nor to any extent increased the flood hazard thereto. (Citation: Davis, 900; Matthes, 1140, 1150, 1222, 1221)

49. The Court declares that various levee and drainage districts and the holders of bonds in such districts assert some claim against the United States growing out of the passage of the Flood Control Act of May 15, 1928, and the engineering plan therein adopted which contains certain provisions for the creation of a proposed floodway in the Boeuf Basin, that such districts and the said bond holders therein have been brought into this cause by order of this Court in order that all issues growing out of the alleged taking by the United States of land within the Boeuf Basin and all interests whatsoever that might be affected by said action may be adjudicated insofar as the interests of plaintiff's lands herein are concerned; that said levee and drainage districts are quasi-public corporations, organized and existing under and by virtue of the laws of the State of Arkansas, that said districts had issued and sold bonds and that said bonds were owned and controlled by various persons among whom

455 are the St. Louis-Union Trust Company, the Franklin-American Trust Company, and the Mercantile Commerce Bank & Trust Company, interpleaders herein by order of this Court; that the amount of bonds issued by the various corporations and the interest of the said bank and trust companies heretofore named are set out and filed in a stipulation at the close of the hearing in this case between said various parties and the defendant, and that for the purpose of this hearing and the determination of the interests of each, if any, the Court finds the matters set out in the stipulation as proven fact.

50. The Court finds that the said drainage and levee districts had issued said bonds in accordance with the provisions

of the laws of the State of Arkansas under which they were created, that such bonds are obligations of the various corporations issuing same; that under the laws of the State of Arkansas provision is made for a tax lien upon the various lands within said various districts and that the said State of Arkansas provides a method and manner for levying and collecting such taxes; that said obligations, bonds and securities so issued are the direct obligations of the various corporations issuing same and that the statutes of the State of Arkansas make a full and complete provision for the annual collection of taxes for the benefit of said districts to pay said bonds and interest thereon; that said districts were at the time of the filing of this action a legally operating body and were not *functis officio* and were required under the laws of the State of Arkansas to proceed under said laws for the collection of taxes for the payment of the various bonds then due and the interest on same; that the laws of the State of Arkansas make a full and complete provision for the assessment and collection of such annual taxes for the benefit of said districts for the purpose of the payment of said bonds and interest thereon.

456 51. The Court further finds that the various persons owning land within said districts were not direct parties in interest or privity thereto in any contract existing between said drainage and levee districts and the owners and holders of the bonds issued by them and as such there is no personal obligation other than as provided by the statutes of the State of Arkansas for the payment of taxes annually assessed for the purpose of discharging said obligations due by each and every land owner within said district.

52. The Court further finds that the said districts can collect only such taxes and in such amounts as may be lawfully levied against the land within said districts and carried out annually upon the tax books of the various county collectors.

53. The Court further finds that the United States of America is not a party to any contract immediate or remote existing between said districts and the various bond holders or between the land owners and the various districts; that the United States has not guaranteed by underwriting or otherwise any such bonds, nor has it promised to answer for the debt or default of said land owners in the payment of their taxes or of the various levee districts in the liquidation of their said bonds.

54. The Court further finds that said bond issues are pay-

entirety and that the same are not now due and payable in their entirety but various issues are not due until some remote date.

55. The Court further finds that there is no evidence in this case that any land owned defaulted in the payment of the tax assessment against him or them because of the passage of the Flood Control Act or of anything that the United States has done to prevent such payment by the said land owners, or to prevent the lawfully qualified collector of such taxes as may be due, from such land owners.

457 56. The Court further finds that such alleged owners of the bonds who are entered as interpleaders herein are still the owners and holders of said security and that the same are now in their hands and constitute a valuable asset.

57. The Court further finds that the United States has neither taken the lands within the said levee and drainage districts herein named nor the lien on any of the special assessments thereof, nor the right of the levee district to pursue its remedy against the individual owners of the land.

Whereupon, the defendant, separately and severally, requested the Court to declare the following:

(Conclusions of Law requested by Defendant.)

#### Conclusions of Law.

1. The Court declares as a matter of law that under the proof adduced in this case that the plaintiff has failed to sustain the allegations of her petition and that there is, as a matter of law, no taking of the plaintiff's property by the United States for which the said Government is liable by any law of Congress or under the Fifth Amendment to the Constitution.

2. The Court declares that under the Pleadings in this case and under the evidence adduced in support thereof, and under the law applicable thereto the Plaintiff has failed to establish a cause of action versus the United States of America and that she cannot recover.

3. The Court declares that Section 4 of the Flood Control Act of May 15, 1928, made it obligatory upon the Secretary of War to provide flowage rights only where and when "additional destructive flood waters would pass by reason of



and the Court further declares that by the term diversion as used in said Act, Congress meant "planned diversion",  
 458 and the Court further finds that it was not the intent of the Engineering Plan, adopted by Congress to cause flood waters to pass into the Boeuf Basin from the main channel of the Mississippi River by any "planned diversion"—that is by any act done or caused to be done by the Chief of Engineers, his servants, or agents, but further finds that if such waters should pass the same would be natural topping of the river banks due to the excessive height of said flood waters.

4. The Court declares as a matter of law that channel stabilization was a part and parcel of the Engineering Plan of the Flood Control Act and that the Chief of Engineers was acting within the scope of his authority in making such improvements and changes involving bank revetments, dredging of the channel, and the construction of cut-offs where in his opinion the same would serve the purpose of channel stabilization and aid of navigation. Sections 1, and 2, Act of May 15, 1928, H. D. 90, Sec. 2.

5. The Court declares as a matter of law that the Flood Control Act of 1928 and the authorized participation in matters of Flood Control on the Mississippi River within the alluvial valley was but an effort on the part of the United States to work in conjunction with the various states and political entities thereunder and not an assumption on the part of the United States to assume unrestricted control of all levees and levee structures on the main stem of the Mississippi River, Snowden vs. Red River, etc., 134 So. 389, and the Court further declares as a matter of law that the states own and control the banks of all navigable streams and that the United States has no control thereof except for the purpose of navigation and such other purposes as are delegated to the Federal Government under the Constitution of the United States and further declares as a matter of law that the Sovereign State of Arkansas or any political entity thereunder, or the inhabitants thereof have the inalienable right to protect themselves, their property and effects, against  
 459 flood waters at such times as they are threatened with devastating overflow unless and until said states had by proper enactment of law by its duly constituted legislative authority surrendered such authority to the Federal Government. Pollard vs. Hagan, 3 Howard 212, 219.

6. The Court declares the law to be that Section 4 of the Flood Control Act of May 15, 1928, provided procedure for

the acquirement of land to be used under the contemplated project and provided that such lands should be acquired by the Secretary of War by condemnation in the United States District Court in the District where the said property was located and that under said Act the Secretary of War has the discretion as to when such proceedings will be brought, and the necessity therefor. And the Court further declares that such provision relative to the condemnation of land and rights-of-way governs proceedings of such nature to the exclusion of other State or Federal enactments, and the Court further declares that before an action at law for a taking can be maintained it must appear that the Secretary of War has abused the discretion placed within him by the Flood Control Act or that the land owner has been deprived of his property or the protection thereto, or that his premises have been invaded and appropriated by some overt act done by some agency of the Federal Government. U. S. vs. Gideon Anderson (D. C. Mo. 1936) 16 F. Sup. 627.

7. The Court declares that the Flood Control Act of May 15, 1928, was designed and intended as an act to cooperate with the states and local interests for the control of floods rather than to supersede state dominion over levees and drainage projects and that the passage of said Act by Congress was but an enabling act to permit the Federal Government to participate with and assist such local interest in the project of flood control and did not render functis officio the levee boards under whose jurisdiction the various river front levees had been constructed and the Court further declares the law to be that such levee boards within their respective levee districts are enjoined with the same duties, privileges and responsibilities that existed prior to the passage of said Act. Snowden vs. Red River, etc. 134 So. 589, Cert. Dism. 284 U. S. 592, Section 2 Flood Control Act of May 15, 1928.

8. The Court finds that although the Flood Control Act of May 15, 1928, provides for a floodway down through the Boeuf Basin, with a fuse plug levee at the head thereof to be overtopped when a stage of 60.5 feet is reached at Arkansas City, and that the levees above and below and on the opposite side of the river would be raised three feet above said fuse plug levee, permitting the waters of the Mississippi River in excess of its capacity to escape the flow down through said Boeuf Basin.

The Court further finds that as a matter of law the plaintiff

waters over and across plaintiff's land. Additional flood waters as used in the Act of May 15, 1928, is declared to be flood waters that may be diverted from the main channel of the river by lowering the levees at the head of the basin, and withdrawing protection that has heretofore existed.

Marion and Rye Valley Ry. Co. v. United States, 270 U. S. 80; 46 Sup. Ct. 253, 70 L. ed. 585.

Joslin Mfg. Co. v. City of Providence, 262 U. S. 668; 67 L. ed. 1167.

Coleman v. United States, 181 Fed. 599, 603.

Salt Lake City v. East Jordan Irr. Co., 121 Pac. 592, 595.

9. The Court declares as a matter of law that it is the design and intent of the United States to abandon the construction of the so called Boeuf Floodway or their use thereof as provided for under the terms of the Act creating same May 15, 1928, when Congress adopted the revised and amended plan of the Act of July 15, 1936, and the Court further declares that the Secretary of War and Chief of Engineers are without authority to proceed further with the use or construction of the so called Boeuf Floodway as provided for by the Act of 1928.

10. The Court finds that the Engineering Plan adopted by Congress and as set out and explained by the Chief of Engineers in his report contained in House Document 90, contained several projects affecting different parts of the alluvial valley and that each project was a separate entity and

The Court declares as a matter of law that work on or the completion of any separate entity included in the general plan submitted by the Chief of Engineers in House Document 90 was of and in itself an independent and separate project.

11. The Court declares as a matter of law that Congress by its action subsequent to May 15, 1928, and by the passage of the Act of June 15, 1936, abandoned the Boeuf Floodway and substituted therefor the Eudora Spillway, and further declares that the Secretary of War nor the Chief of Engineers can since the adoption of the subsequent legislation proceed with the construction as provided for under the Act of May 15, 1928.

12. The Court declares as a matter of law that work done under the authority of the Flood Control Act and upon the adopted project at other places other than the western section of the middle division cannot be construed as the same

Further declares as a matter of law that said plan is divided into various projects and work upon one project of said plan cannot be construed as a taking of territory or lands or property at some other section where no work is being done.

13. The Court declares the law to be that Secretary of War and Chief of Engineers were acting within the scope of their authority under the law in aid of flood control and navigation in the creation and construction of the cut-offs within the main channel of the Mississippi River, as testified to by the various witnesses for the defense, and further declares as a matter of law that such cut-offs are now a part and parcel of the general engineering plan to facilitate the escape of flood waters through confining same to the main channel of the Mississippi River.

14. The Court declares the law to be that the Act of May 15, 1928, made it discretionary where and when the Secretary of War and the Chief of Engineers would commence condemnation proceedings for all purposes contemplated by said Act. (U. S. v. Stubbs, 35 Fed. (2) 357) and the Court declares further that it was within the discretion of said officials of the United States whether or not condemnation proceedings should be brought for the land within the Boeuf Basin and further declares that a failure to bring such action did not of itself, under the evidence in this case amount to a taking in law.

U. S. v. Stubbs, supra.

U. S. v. Gideon Anderson (Mo. 1936) 16 F. Sup. 627—In re condemnations etc. 266 Fed. 105.

Mullen v. U. S. 140 U. S. 240.

15. The Flood Control Act of May 15, 1928, vests the Secretary of War to determine when proceedings are to be instituted to condemn easements and land in carrying out the Flood Control projects. In determining where the necessity exists to institute such proceedings attention must be given to considerations other than the amount of compensation to be paid. The statute having given the Secretary of War the discretion to act, he alone is to determine where the necessity therefor exists in re condemnation for Imp. etc. Cases cited above.

16. The Court declares the law to be that the filing of condemnation proceedings for land to be used for the construction of levees within the so called Boeuf Floodway was of itself not a taking within the purview of the Fifth Amend-



ment to the Constitution of the United States, and the Court further declares that the Secretary of War and Chief of Engineers or those acting under their supervision and authority were acting within their rights in the dismissal of any condemnation suit which had been instituted to acquire land within the Boeuf Floodway if such action was taken in the dismissing of said suit prior to final judgment therein and the fixing of a value to said premises and before the land owner's right to compensation had become vested.

Nixon v. Marr—190 Fed. 913.

Benedict v. N. Y. 98 Fed. 789.

Dist. of Columbia v. Washington Steel 43 Appl. 344, 20 C. J. Sec. 458.

17. The Court declares as a matter of law that the United States is not liable for any injury that was in its nature indirect and consequential for which no implied obligation on the part of the Government can arise,

Franklin v. U. S. 16 Fed. Supp. 260 L. C.

Kirk v. Goode 13 Fed. Supp. 1020.

Manigault Springs etc. 199 U. S. 473.

Gibson v. U. S. 166 U. S. 269.

Bedford v. U. S. 192 U. S. 217.

Northern Transportation Co. v. Chicago, 99 U. S. 635.

Jackson v. U. S. 230 U. S. 1.

Horstmann Company v. U. S. 257 U. S. 138.

Coleman v. U. S. 181 Fed. 599.

And the Court further declares that if the passage of the Flood Control Act creating a general plan of flood control had any depressing effect whatever upon the market value of plaintiff's land and lands similarly situated that in itself did not constitute such a damage for which the United States was liable but that if such damage did exist it was of a consequential and anticipatory and speculative nature and is *damnum absque injuria* and for which the United States is not liable, citing cases *supra*.

18. The Court declares the law to be that, before there can be a recovery against the United States government for taking of private property for public use under the Fifth Amendment of the Constitution, there must be an actual physical invasion of or an encroachment upon private property by the Sovereign, or there must be such a constructive invasion as amounts to a practical ouster of claimant's possession; and before the plaintiff in the instant case can recover, she must show that there has been an actual invasion of her land amounting to an ouster, an overflow of

such permanent character as to imply an intent to take, and a correlative obligation to pay for the lands so taken.

*Jackson v. United States* 47 Ct. of Cls. 579, 613; id, 230 U. S. 1.

*Peabody v. U. S.* 43 Ct. Cls. 5; id, 231 U. S. 530, 539.

*High Bridge Lumber Co. v. U. S.* 69 Fed. 320.

*Manigault v. Springs*, 199 U. S. 473; 26 Sup. Ct., 127.

19. A claimant may not maintain and recover in an action against the Government under the Tucker Act for a taking of his property except upon an implied contract on the part of the Government to pay therefor: and to give the Court jurisdiction there must be a contract that is implied in fact and not based merely on equitable considerations and implied in law.

*Alabama v. U. S.* 282 U. S. 502; 51 Sup. Ct. 225.

*Sutton v. U. S.* 256 U. S. 575; 41 Sup. Ct. 263.

*B. & O. Ry. Co. v. U. S.*, 261 U. S. 596; 43 Sup. Ct. 384.

*U. S. v. Minn. Mutual Invest. Co.* 271 U. S. 212.

20. The Court declares the law to be that the United States is not liable in damages to the plaintiff for the raising or changing the levees on the opposite bank of the Mississippi River where such changes had for their purpose the better control of the flood waters or the retention of said river within its natural channel.

*Jackson v. U. S.*, 230 U. S. 1.

*Franklin v. U. S.*, 16 Fed. Supp. 253.

21. The Court declares the law to be that the United States Government is not liable under the Tucker Act for damages caused by overflow due to accidental and extraordinary floods that may be the result of work done in the improvement of its navigable rivers, especially where no work was done in the channel of the river to cause such flood, such as the construction of locks and dams to interfere with its flow.

465 *Cubbins v. Mississippi River Comm.* 241 U. S. 357; 60 L. ed. 1041, 36 Sup. Ct. 671.

*Jackson v. United States*, 230 U. S. 1; 57 L. ed. 1363, 35 Sup. Ct. 238.

*Bedford v. United States*, 192 U. S. 217.

*Hughes v. United States*, 192 U. S. 217; 40 L. ed. 414.

22. The Court declares as a matter of law that the United States cannot be held to respond in damages for any spec-

Floodway, and that if the State of Arkansas or any of the Road Districts therein have at any time changed, altered, or desisted in highway improvement because of the adoption of the Flood Control Act of May 15, 1928, the said United States cannot be held to answer in damages to the property owners therefor.

Franklin v. U. S., 16 Fed. Supp. 260 L. C.

Kirk v. Goode, 13 Fed. Supp. 1020.

Manigault Springs, etc., 199 U. S. 473.

Gibson v. U. S., 166 U. S. 269.

Bedford v. U. S., 192 U. S. 217.

Northern Transportation Co. v. Chicago, 99 U. S. 635.

Jackson v. U. S., 230 U. S. 1.

Horstmann Company v. U. S., 257 U. S. 138.

Coleman v. U. S., 181 Fed. 599.

23. The Court declares as a matter of law that if any local agents such as the Highway Commission, the Department of Health, have withdrawn improvements, attention, and supervision from the so-called Boeuf Floodway because of the passage of the Flood Control Act of May 15, 1928, and the selection of said territory as a part of the engineering plan as a floodway that such action on the part of the local or state government is decreed and declared to be anticipatory of future damages and if the territory and lands therein have decreased in valuation due thereby, such damages are of a consequential, anticipatory and speculative nature for which the government of the United States is not liable, and the plaintiff herein cannot recover for any part thereof. Cases cited above.

24. The Court declares as a matter of law that it is controlled by the language of the statute rather than by discussions in Congress or evidence taken before congressional committees or individual opinions of the authors of public documents, and advert to these proceedings only as they seem to confirm the intent of Congress as expressed in an Act or any section thereof, U. S. v. Hess, 466 71 F. R. (2d) 80 L. C., and the Court further declares as a matter of law that such debates, testimony, or expressions of opinion as to the effect of flood waters within the Boeuf Basin cannot be received as proof of the issues involved in this case nor may they be considered by the Court as evidentiary matter, and the Court declares that the comments, explanations and elucidations contained in the Engineer's Report published in House Document 90 are no part of the Engineering Plan adopted by Congress and that the same cannot be re-

ceived as evidenciary matter and cannot be considered by the Court as such.

25. The Court declares as a matter of law that the interpleaders have no interest in or claim to the land of the plaintiff; that the assessments made against her land to meet bond maturities and interest are due annually and are payable to the district and that said assessments are a lien upon her land in favor of the district or districts in which it may lie, and there is no lien thereon in favor of the interpleaders or either of them, and they have no cause of action against the defendant government by reason of the default of any such district or districts in the collection of annual assessments and applying same to the payment of bond maturities and interest.

Mullen Development Co. vs. U. S., 290 U. S. 89;  
Omnia Com. Co. vs. United States, 261 U. S. 502.

26. The Court declares as a matter of law that, if the interpleader districts, the Cypress Creek Drainage District and the Southeast Arkansas Levee District have been unable to collect sufficient assessments due on land in their respective districts since 1928 to meet bond maturities and interest, and if such inability to collect such assessments has  
467 been due to the fear of landowners in the respective districts that their land would be flooded by reason of flood from the Mississippi River on account of the Flood Control Act of May 15, 1928, this loss if any, is not due to any act on the part of the United States Government or of its officers, agents, or/and employees, but is wholly due to a fanciful and speculative apprehension and is consequential and does not constitute an element either of damage or a taking.

Peabody vs. United States, 231 U. S. 530;  
Portsmouth Harbor vs. U. S., 277 U. S. 603;  
Sanguinetti vs. U. S., 269 U. S. 146;  
Bedford vs. United States, 192 U. S. 217;  
Jackson vs. United States, 230 U. S. 1.

Whereupon, the Court took the cause under advisement and on October 21, 1937, filed the following

(Opinion of District Court.)

Davis, J.

This action was instituted under the Tucker Act, 28 USCA



property for a public purpose. Plaintiff owns forty acres of land in Desha County, Arkansas, the fair market value of which, it is alleged, was reduced from \$5000 to \$1000 as a result of the establishment of the Boeuf Floodway, which included plaintiff's property, under authority of the Flood Control Act of May 15, 1928: 33 USCA 702a—702m.

The Interveners were made parties upon motion of defendant.

The answer of defendant asserted (1) that the enactment of the Flood Control Act created no express or implied obligation to compensate plaintiff, or that any act of the Government done under authority of the said statute constituted a taking of plaintiff's property; and (2) that the Boeuf Floodway had by a subsequent Act of Congress been abandoned and the Eudora Floodway substituted in lieu thereof.

Following a destructive flood in 1927, Congress authorized the execution of an extensive flood control program in the Mississippi Valley, from Cape Girardeau, Missouri, to the Head of the Passes in Louisiana. The Flood Control Act adopted a plan suggested by the Chief of Engineers, commonly called the "Jadwin plan", as the same was set out in Document number 90, House of Representatives, 70th Congress, 1st Session. That portion of the plan of immediate concern in this case deals with the suggested treatment of the Mississippi River from the White and Arkansas Rivers, on the north, to the Red River, on the south, usually referred to as the "middle section".

#### 1. House Document No. 90:

"117. *Old River to the Arkansas.*—The flood of 1927 rose 60.5 on the Arkansas City gauge. It has been estimated that had it been confined and crevasses not occurred the gauge height would have been 69. The top of the present levee is 60.5. To take care of this flood with proper freeboard would require present levees to be raised about 12 feet. Such an increase in levee height would greatly intensify the disaster resulting from an accidental failure of a levee, besides being inordinately costly. Nor would they be safe, for it has been estimated that floods might come which would produce, if confined, stages of over 74 feet. It is obvious that no attempt should be made to raise levees to such a height. The practical remedy is to raise the levee grade 3 feet on both sides of the Mississippi below the Arkansas River, to strengthen these levees so that they will not fail from causes other than accident or overtopping, and to preclude overtopping by insuring that the water in excess of the capacity of the leveed channel be spilled out near the mouth of the Arkansas.

"118. To insure that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress Creek must be kept at its present strength and at its present grade, viz., 3 feet below the new levee grade. This relatively weak section will be long enough to discharge the greatest predicted possible excess water over and above the capacity of the leveed river below. In order to limit the land in the Tensas Basin overflowed

469 During periods of unusually high water in the Mississippi River, the stress on the levee system was increased at the mouth of the Arkansas and the White River. The levees in that vicinity did not withstand the flood waters of 1927, but crevasses at Medford, and Pendleton on the south side of the Arkansas, and at Mounds Landing on the east side of the Mississippi. To protect against floods approximating or equaling that of 1927, it was conceived to be necessary to relieve the riverside levees by diverting a substantial portion of the water from the channel of the river into a designed floodway.

The Jadwin plan made provision for a floodway starting shortly south of the mouth of the Arkansas River, at Cypress Creek, thence southwardly along the basin of the Boeuf River to the backwater area of the Red River in the State of Louisiana. The source of this floodway, as planned, extended along the levee on the west side of the Mississippi River from Rohwer to Luna Landing, a distance of thirty miles.

The essential features of the proposed floodway, as they were set forth in the plan adopted, were (1) a section of the riverside levee at Cypress Creek, designated a fuse plug, across the upper end of the floodway, of less height than the contiguous levee, ~~at~~ the levee on the opposite side of the river; this was to be provided by leaving intact and unaltered the then existing riverside levee, built and maintained at the 1914 grade and section, as established by the Mississippi River Commission. The grade of this fuse plug section was equivalent to 60.5 feet on the gauge at Arkansas City. When the river reached that stage, the water

natural ridges do not serve, from the Cypress Creek levee to backwater in the lower Tensas Basin. Arkansas City is to be inclosed with a levee. This floodway will be wide enough to carry the water without clearing and without maintenance except for the side levees. It is unwise to attempt to limit the volume of flow that may possibly enter the floodway to a narrower floodway that might prove of insufficient capacity. A narrower floodway cleared of timber was considered, but the clearing was found to be unwarrantably expensive in first cost and maintenance for the increased efficiency of discharge produced thereby. It will be much better to let the land be gradually cleared as it is developed for use. At some future time, the development of the region may warrant the first cost and maintenance of a cleared floodway of less width.

"119. The Boeuf River bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land. Water will not top the Cypress Creek fuse plug levee and go down the floodway until it is so high that it must find an outlet. No flood except that of 1927 has reached such a stage. However, due to an increase in flood heights by reason of levee construction and drainage, it has been estimated that a stage over the present levee top at Cypress Creek might occur in the long run about once in 12 years. The lands in the floodway will be inundated only by floods that would overtop the present levee system, and they will retain the same measure of protection that they now have."

would run over the levee and into the floodway. (2) The grade of the riverside levees above and below the fuse plug section, as well as that on the east side of the river, was to be raised three feet, to effect the entry of excess flood water into the floodway. (3) A system of guide levees, on the east and the west side of the floodway to hold the water in the designated channel, and prevent it from spreading out on the lands on either side.

The Floodway Act created a board to adjust engineering differences between the adopted project and the plans suggested by the Mississippi River Commission, and to make recommendations to the President. The decision of the President on such matters was to be final. This decision was made on January 10, 1929, in a communication to the Secretary of War, in which he approved the construction of the levees in the Boeuf Floodway.

471 The execution of the flood control program was commenced in 1929, and has been continued to the present time. When this suit was filed in August, 1934, the status of the contemplated work in the middle section was this: the levee, for a distance of about sixty miles, from Yancopin, on the south bank of the Arkansas River, to Vanclose, on the west bank of the Mississippi, remained at the 1914 grade and section. This not only included the fuse plug section, but also about fifteen miles of the original levee, both above and below the fuse plug section. The riverside levee, above and below the sixty mile Cypress Creek gap, had been raised about three feet to the 1928 grade and section, and the levee on the east bank of the Mississippi had likewise been raised to the new grade.

The reason that the long gap of the old levee was left intact, instead of merely the fuse plug section, is to be found in a provision of the Flood Control Act, to the effect that, pend-

2. The President approved in the following language:

"Washington, January 10, 1929.

"Supplementing my approval of August 13, 1928, of the report of the board provided for in section 1 of 'An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes,' approved May 15, 1928, which approval excepted and reserved for future action those parts of the report which contemplated the acquiring of rights in land for constructing spillways and floodways, the construction of the protection levees in the Boeuf Basin, as provided for in the adopted project, is approved.

"Land for rights-of-way for these levees will be secured by condemnation as authorized by law, provided that those lands may be purchased, when they can be thus secured at reasonable prices, which shall not in any case exceed two and one-half times the assessed valuation of the present time.

(Signed) CALVIN COOLIDGE."

(House Committee Document No. 2, 71st Congress, 1st Session, page 12.)

ing completion of the floodway, lands within it are to have the same protection as lands on either side.<sup>3</sup>

The Government did not proceed with the construction of the Boeuf Floodway on account of "local opposition".<sup>4</sup> In fact, its progress was enjoined.<sup>5</sup> The Committee on Flood

472 Control of the House of Representatives, on January 28, 1932, requested the Chief of Engineers to review the status of the works then in progress with the view of determining whether modifications should be made in the plan. The response was the report of the Chief of Engineers, dated February 12, 1935.

This report contained a complete review of the progress of the flood control program, and recommended the amendment of the Act of May 15, 1928, in certain instances, one of which affected the plan as applied to the "middle section" of the river. This recommendation was that the Boeuf floodway as provided in the Jadwin plan be abandoned, and the Eudora floodway be substituted in lieu thereof. The suggested new floodway to have its source on the west side of the Mississippi River, near the town of Eudora, Arkansas, about one hundred miles south of the mouth of the Arkansas River. A back protection levee was to extend from the head of this floodway to the Arkansas River. The pertinent section of the report of the Chief of Engineers is printed in the footnote.<sup>6</sup>

3. Section 702a—" \* \* \* provided further, that pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway \* \* \*"

4. Report of Chief of Engineers, February 12, 1935, Flood Committee, Document No. 1, House of Representatives, 74th Congress, 1st Session:

"9. All parts of the project works in the middle section, except the Boeuf Floodway and the raising of the main river levees adjacent to its head, have in general been completed. Because of local opposition the construction of the Boeuf Floodway levees has not been undertaken \* \* \*"

5. *Kincaid v. United States* (C. C. A. 5) 49 P. (2d) 768; reversed, *Hurley, Secretary of War v. Kincaid*, 285 U. S. 95.

6. Report of Chief of Engineers, February 12, 1935, Flood Committee Document No. 1, House of Representatives, 74th Congress, 1st Session:

"11. I recommend that the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of the Passes to Cape Girardeau, authorized by the Flood Control Act of May 15, 1928, be amended substantially as recommended by the Mississippi River Commission in its report dated January 19, 1935, to provide:

"(1) The abandonment of the Boeuf Floodway, and in lieu thereof the construction of the Eudora Floodway, west of the Mississippi River extending from the latitude of Eudora into the Red River backwater area, with a control structure at its head.

"(2) A back-protection levee extending from the head of this floodway north to the Arkansas River, so located as to afford adequate space for the escape of flood waters without endangering the levees on the east side of the river.

"(3) The maintenance of the present river levees between the head of the Eudora Floodway and the northern junction with the protection levee, at the 1914 grade and section, except in front of densely populated areas, as a part



473 Congress adopted the recommendations of the Chief of Engineers by the passage of the Overton Bill, approved June 15, 1936. 33 USCA 702a-1 to 702-10.<sup>7</sup> The plan of flood control thus provided for the section of the valley from the Arkansas River to the Red River is commonly referred to as the Markham plan.

A detailed description of the Eudora floodway or its operation is not conceived to be necessary in this case. Its general course is much the same as the Boeuf Basin, but it clings closer to the west bank of the Mississippi, passing on the east side of Macon Ridge, and terminates in the backwater area of the Red River.

The total acreage of the Boeuf Floodway is approximately 1,326,000 acres. In the Eudora floodway, there are 702,000 acres. The northern extension of this floodway to the Arkansas River would add 119,000 acres, making a total acreage of 821,000.

474 The plaintiff's land is also in the Eudora floodway, but reliance is not placed upon that fact in this case.

The Mississippi River between the Arkansas and the Red Rivers, follows a very winding course. There are levees on either side, but in the main, these levees are many miles apart. Between those levees, the river winds back and forth from east to west, and west to east, forming loops, known as the Greenville Bends, while the general course of the stream is to the south. During the progress of the execution of the flood control program, the Government has undertaken to

<sup>7</sup> Act of June 15, 1936, sections 1 and 2:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the control of floods of the Mississippi River and its tributaries, adopted by Public Act Numbered 391, approved May 15, 1928 (45 Stat. 534), Seventieth Congress, entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes," is hereby modified in accordance with the recommendations of section 43 of the report submitted by the Chief of Engineers to the Chairman of the Committee on Flood Control, dated February 12, 1935, and printed in House Committee on Flood Control Document numbered 1, Seventy-fourth Congress, first session, as hereinafter further modified and amended; and as so modified is hereby adopted and authorized and directed to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers.

"Sec. 2. That the Boeuf Floodway, authorized by the provisions adopted in the Flood Control Act of May 15, 1928, shall be abandoned as soon as the Eudora Floodway, provided for in Flood Control Committee Document Numbered 1, Seventy-fourth Congress, first session, is in operative condition and the back-protection levee recommended in said document, extending north from the head of the Eudora Floodway, shall have been constructed."

straighten the channel and increase its discharge capacity, by making a series of "cut-offs", thus eliminating some of the bends. Eleven of these cut offs have now been made, and a system of dredging installed to protect and improve the channel of the river. The engineers refer to this program as channel stabilization. The distance by river from the Arkansas to the Red Rivers was 372.3 miles, and by reason of the cut offs it has been shortened 100.6 miles."

475 One purpose of this program is to increase the discharge capacity of the river. The engineering witnesses at the trial were in accord on the fact that as a result of this program the flood level of the river in the vicinity of the Cypress Creek gap was lowered during the flood of February, 1937. But there was disagreement among the engineers as to whether this effect was temporary or permanent, and as to whether this practice was sufficiently free from hazard as to be advisable.

It was also contended by the plaintiff that the making of the cut-offs was not in accord with the Jadwin plan, and hence of no concern in this case."

8. Report of Chief of Engineers, Committee on Flood Control, Document No. 1:

"10. The course of the Mississippi River in the middle section is generally tortuous, especially through the Greenville Bends, a series of wide loops below the mouth of the Arkansas. With a view to increasing its flood discharge capacity, experimental work on a large scale has been undertaken in the rectification of the channel by cut-offs. This rectification through the Greenville Bends, by the forces of nature or by design, may so lower the local flood heights that the fuse-plug levees at the head of the Boeuf Floodway will carry more than the safe capacity of the river below them."

9. House Document No. 90:

"69. *Straightening channel*—Artificial or natural cut-offs shorten the reach where they occur and by increasing the slope and velocity produce a local lowering of the flood stage. However, the increased velocities immediately cause excessive bank caving either in the reach or near it, and the river eventually lengthens itself with new bends. The changes in the channel cause great damage and expense. The bank revetment now in use, expensive as it is, has not been subjected to and withstood such velocities as would be caused by cut-offs. Low-water navigation in any stretch is likely to be temporarily destroyed by bars created by the excessive bank caving caused by a cut-off. The method is too uncertain and threatening to warrant adoption.

"70. In an unsettled region and on an unleveed alluvial stream a program of cut-offs and bank protection, begun at the lower end of the river and progressing upstream, might be desirable in anticipation of settlement of the region." But such a condition is not hypothetical. In the present case, the river banks are not yet revetted to the extent necessary for shortening of the stream, nor will they be for years; levees are already in place, though not to final height, conforming to the river in its present shape; valuable cultivated land would be lost, and landings and towns along the river would be cut off from navigation. Completion of the levees needed for protection can not be postponed until a cut-off and revetment project could be carried out.

"71. It is advisable to adhere to the present policy of preserving the river generally in its present form and not to undertake a plan of flood control or of improvement for navigation that involves the formation of cut-offs."

476 The defendant, on the other hand, contended that channel stabilization, which includes the making of cut offs, was an integral part of the flood control plan.<sup>10</sup>

It must be clear that the original flood control plan did not essentially have as its basis a program of channel straightening by means of cut offs. The hazard of this practice was clearly set out in the engineering report of the plan. On the other hand, this project, and the statute directing its execution arose out of the impetus of the most disastrous flood that ever visited the valley. A ten year program was undertaken. The plan adopted was only in outline. Discretion as to the details of execution was vested in the Secretary of war.<sup>11</sup> If experience in the carrying out of the pro-

477 ject dictated that a system of cut off be adopted, with the view of improving the channel of the river, and in-

10 House Document No. 90:

"147. I recommend the adoption and authorization of a comprehensive project for the flood control of the Mississippi River in its alluvial valley and its improvement from the Head of the Passes to the Ohio River as set forth in this document, to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers; the project to include the floodways, spillways, levees, channel stabilization, mapping, etc., hereinbefore recommended, with such modifications thereof as in the discretion of the Secretary of War and Chief of Engineers may be advisable, and the maintenance of a navigation channel from Cairo to New Orleans not less than 300 feet in width and 9 feet in depth \* \* \*"

"131. Channel stabilization.—Since the levees within the limits of this project are to be greatly enlarged, they will be much more expensive than heretofore, so something must be done to avoid the frequent moving of them from the proximity of caving banks. In addition, the river can not be regulated for low-water navigation until the banks are made stable, this both to keep the channel in one place and to stop the enormous dumping of earth into the river by bank caving. A general bank-protection scheme must be carried out. This will consist of revetting banks by proven methods and in addition trying new and cheaper methods to accomplish the same result. At the same time regulation of kind which has been successfully accomplished above Cairo will be undertaken below when and where the banks become stable. The plan includes a 10-year program of channel stabilization and river regulation at a total cost of \$110,000,000, or \$11,000,000 per year. This program may need revision upward after some years, as the rate and total amount of work above contemplated is a minimum."

11 House Document No. 90:

"138. Program of work.—The project is to be completed within ten years. Twenty-five million dollars can be advantageously expended the first year and approximately thirty million dollars each year thereafter until the project is completed.

"139. Execution of plan.—The plan herein recommended is general in its scope. It is recommended that the responsibility for the execution of the plan, the details of the design, and location of the engineering works and structures be placed upon the Chief of Engineers under the supervision of the Secretary of War, as is done by acts of Congress in the case of river and harbor improvements."

creasing its discharge capacity, nothing can be more certain than authority so to do may be found in the Jadwin Plan.

The flood of January and February, 1937, when the Mississippi River reached its highest recorded stage at Cairo and Memphis, the gauge at Arkansas City was 53.87 feet. This was 6.63 feet below the point at which the fuse plug would have been overtopped. This was in part due to the channel stabilization program carried on by the Government, which reduced the flood level in the fuse plug section, and lessened the hazard to which plaintiff's property was subject.

The nature of the flood control plan, and the progress that has been made in its execution, have been set out in some detail, because it is conceived that this case must turn upon the factual situation.

The "Tucker Act vests this court with jurisdiction to entertain certain claims against the United States "upon  
478 contract, express or implied". If an obligation to pay exists in this case, it is upon an implied contract. If the acts and conduct of the Government and its agencies have deprived the plaintiff of her property, then reason and justice dictate that an agreement to compensate be implied.

The United States has consented to be sued, but this authority is not to be broadly construed. The courts have announced a well defined doctrine as to the character of act affecting private property, that will create an implied contract on the part of the government to compensate the owner, and upon which the owner may have a recovery in a suit at law, under the Tucker Act. That doctrine may be ascertained from a consideration of the decisions. The cases are summarized merely for the purpose of finding out the character of act on the part of the government that gives rise to an implied agreement to compensate the owner of the property affected.

In each of the following cases it was held that the facts alleged or proved showed that there was a taking of property: where construction of a dam at Great Falls in the Potomac by the government caused water to back up on plaintiff's island, and also deprived plaintiff of valuable water rights;<sup>12</sup> where a dam was so constructed as to interfere with the natural flow of the water in a stream, causing the water level to be raised and the plaintiff's land to be con-

12. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *Great Falls Mfg. Co. v. Attorney-General*, 124 U. S. 581.



continuously overflowed, rendering it unfit for agricultural purposes;<sup>13</sup> where the government constructed a dam and lock which raised the water level in the Cumberland River above its natural stage to the extent that lands not theretofore subject to overflow were frequently covered with water;<sup>14</sup> where a dam was built across the Fox River, raising the water level so that plaintiff's land was continuously overflowed by back water;<sup>15</sup> where erection of a dam caused water to back up and cover a part of plaintiff's land, preventing egress and ingress;<sup>16</sup> where plaintiff's farm was subjected to increased overflow by backwater from a dam erected eight miles below;<sup>17</sup> where a dam, erected to improve navigation on the Muskingum, caused a permanent overflow of claimant's land;<sup>18</sup> where erection of a lock and dam caused water to completely cover a highway built and maintained by Wayne County, Kentucky;<sup>19</sup> where plaintiff's mining claim in Alaska was permanently occupied by the United States Army as a camp;<sup>20</sup> where the government built a Naval Training Station on land over which plaintiff has an easement, forever depriving him of its use;<sup>21</sup> where a Fort was established on a tract adjacent to plaintiff's land on which he operated a summer resort, and guns were repeatedly fired by the government, sending projectiles over plaintiff's property.<sup>22</sup>

It will be observed that in each of these cases there was an actual invasion of private property, or an immediate interference with the use and enjoyment of the same.

480 The doctrine of these and other decisions on the subject is that where the government, in the exercise of its

13. *United States v. Lynch*, 188 U. S. 445; *United States v. Williams*, 188 U. S. 485.

14. *United States v. Cress*, 243 U. S. 316.

15. *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

16. *United States v. Welch*, 217 U. S. 333; *United States v. Sewell*, 217 U. S. 601; *United States v. Grizzard*, 219 U. S. 180.

17. *Jacobs v. United States*, 290 U. S. 13.

18. *Merriam v. United States*, 29 Ct. Cls. 250.

19. *Wayne County, Kentucky v. United States*, 53 Ct. Cls. 417.

20. *United States v. North American Company*, 253 U. S. 330.

21. *Tucker v. United States*, 283 F. 428.

22. *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327.

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functions, for the promotion of some public undertaking, actually invades private property, or places some burden, not merely of a temporary character, upon the possession, use and control of said property, there is a taking, and a promise to compensate the owner will be imputed to the United States.

The United States Supreme Court, in a recent case,<sup>23</sup> stated the law as follows: "in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."

Action on the part of the Government, not directly encroaching upon private property, but which imposes a temporary, occasional, or incidental injury, and impairs its use is regarded as a consequential damage, and does not amount to a taking.<sup>24</sup>

It is not contemplated or prospective encroachments that give rise to the obligation to compensate. It is acts performed that constitute a taking, and form the basis of an implied promise to pay.

Judge Faris said, in *United States vs. Chicago, Burlington & Quincy Railroad Company*:<sup>25</sup> "many cases are to be found holding that no damages can be recovered under the Tucker Act when no part of the land of plaintiff is actually touched or actually taken." Since this case is relied upon by plaintiff, it may be here mentioned that it was a condemnation suit, and the question was what constituted just compensation, the taking of the property not being in issue; while the question here is what constitutes a taking.

In *Hurley v. Kincaid*,<sup>26</sup> the court declared that a landowner in the Boeuf Floodway could not enjoin the receiving of bids for the construction of the guide levees, because "if that

23. *Sanguinetti v. United States*, 264 U. S. 1 c. 149.

24. *Bedford v. United States*, 192 U. S. 217; *Gibson v. United States*, 166 U. S. 269; *Bohncell v. United States*, 254 U. S. 231; *Peabody v. United States*, 231 U. S. 530; *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U. S. 1; *Manigault v. Springs*, 199 U. S. 473; *Salliotte v. King Bridge Co.*, 122 F. 378; *Coleman v. United States*, 181 F. 599; *Wharton v. United States*, 153 F. 876.

25. 82 F. (2d) 1 c. 137.

26. 285 U. S. 95.

which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract." The court was not called upon to consider the question as to whether there had been a taking. There is nothing in this decision, or in any other case, so far as we are informed, to indicate that the court intended to depart from its well established doctrine as to what constituted a taking. But this case does hold that an owner may not demand compensation prior to the taking.

It is argued that a taking of plaintiff's property was effected by:

(1) The enactment of the Flood Control Act of May 15, 1928;

(2) The Proclamation of the President of January 10, 1929, by which he approved the construction of the protection levees in the Boeuf Basin;

(3) The adoption of a program, and the assumption 482 by the government of the control of the fuse plug section, because of which, it is claimed, the plaintiff is deprived of the right of "self defense" against a threatened flood, and her land decreased in market value;

(4) The act of the government in raising the levee above, below and across the river from the Cypress Creek gap, thereby making it certain that in the event of a flood which the levees would not withstand, plaintiff's land would be covered with water.

It seems to be clearly settled by the adjudicated cases that the passage of a statute, standing alone, does not effect the taking of property. The statute may and is often repealed, and until it has been executed to the extent of appropriating the land, an owner is not entitled to be compensated.<sup>27</sup> In fact, the government is free to abandon the plan to acquire land at any time before that result is actually consummated.<sup>28</sup> The date of the statute is not the time of the taking. In condemnation, the date of the suit, award or the judgment fixes the time of the taking.

The approval of the President to the commencement of the work on the Boeuf Floodway is regarded as particularly sig-

27. *Red v. Little Rock Railway & Electric Co.*, 121 Ark. 71, 180 S. W. 220; *Willink v. United States*, 240 U. S. 572.

28. *Garrison v. City of New York*, 88 U. S. 196; 10 R. C. L. 199.



nificant as fixing the time that the government became obligated to compensate the plaintiff. Attention has not been directed to authority for this position. A railroad contended that the statute authorizing government control, followed by the Proclamation of the President, effected a taking  
483 of its property, but the Supreme Court held that a mere technical taking does not create the right to receive compensation.<sup>29</sup> The recording by public authority of a map of a proposed system of highways within a certain territory, without restricting the use of lands before the commencement of proceedings for their condemnation, did not constitute a taking.<sup>30</sup>

The fuse plug section of the levee has not been disturbed. But plaintiff asserts that the landowner no longer has the same right to protect the levee that formerly existed. The grade of this levee was established by the Mississippi River Commission, acting under authority duly conferred. The landowners, prior to 1928 had no right to elevate the established grade. There is nothing in the Act that restricts the privilege of property owners to participate in a "flood fight" by supporting the river front levee, when it is endangered. They did so participate during the 1937 flood. But even if it were otherwise, that fact would not give rise to the contingency out of which plaintiff would become entitled to the relief sought in this case.

The act of the government in raising the other levees in the vicinity to the 1928 grade, and leaving the prolonged fuse plug section at the 1914 grade, is relied upon as constituting the taking of plaintiff's property. Mention heretofore has been made of the fact that it is not only the Boeuf Floodway  
484 fuse plug that remains at the 1914 grade, but a section of the levee approximately fifteen miles in length, both at the upper and the lower end of the fuse plug proper. So plaintiff's land has the same levee protection as all other alluvial lands in that section. This is not by chance, but by design. The statute so required pending the completion of the floodway. The protection levees for the Boeuf Floodway have not been constructed. Consequently, that floodway is not now and never has been in an operative condition. In the event of extremely high water the overtopping of the river-front levee would not be confined to the fuse plug proper, but might take place either above or below that section. If water

29. *Marion & Rye Valley R. R. Co. v. United States*, 270 U. S. 280.

30. *Bauman v. Ross*, 167 U. S. 1, c. 596.

should come over the levee, it would not be confined to the designed channel, but would cover all land of approximately the same elevation. So the project, in the present stage of execution, is not effective to the end designed, and has placed no burden upon plaintiff's land that is not equally shared by all other similar land in that vicinity. Moreover, it was held in *Jackson v. United States*<sup>31</sup> that raising levees on one side of a river was not, in effect, the taking of land on the other side.

The plaintiff offered much evidence tending to show that the project under consideration had decreased the value of land in the floodway. A satisfactory finding on this subject can hardly be made. It is a fact that the value of land in the Boeuf Basin decreased subsequent to 1928. The plaintiff says this was due to flood control plan. The defendant urges that it was due to high taxes, the depression, the low  
485 price of agricultural products, and was by no means confined to the alluvial lands in southeastern Arkansas. There is no occasion to undertake to determine the extent, if any, to which the project contributed to the decrease in the value of plaintiff's land.

No part of plaintiff's land has been appropriated for use as levee right of way, and no actual entry of any kind or character has been made thereon. No water has been diverted over plaintiff's land, and there has been no overtopping or crevassing of the fuse plug section of the river front levee since the passage of the Act in question. There has been no reduction in the grade of the levee protecting plaintiff's land, and no right acquired or sought to reduce this protection. There has been no interference with the plaintiff's possession, occupancy and use of the said land.

In our opinion, it cannot be successfully contended that plaintiff's land has been appropriated by the defendant, thereby giving rise to an implied contract to compensate the owner.

In view of this conclusion, it is not conceived to be necessary to make any findings as to the intervenors.

The Court adopts Findings of Fact 1 to 49 inclusive, and Conclusions of Law 1 to 23 inclusive, and refuses to adopt Findings of Fact 49 to 57 inclusive, and Conclusions of Law 24 to 26 inclusive, submitted by the defendant.

The Court refuses to adopt Findings of Fact and Conclusions of Law submitted by plaintiff, in so far as they are inconsistent with the Findings and Conclusions herein adopted.

The Court directs that judgment be awarded defendant.

To all adverse rulings herein made, the respective parties are allowed exceptions.

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492 (Approval of Bill of Exceptions by Counsel.)

Come the plaintiffs, Julia Caroline Sponenbarger, Grady Miller as Receiver for the Southeast Arkansas Levee District, Alex H. Bowell and William R. Humphrey, as Receivers for the Cypress Creek Drainage District; Cypress Creek Drainage District; Mercantile-Commerce Bank and Trust Company and Mercantile-Commerce National Bank in St. Louis, and St. Louis Union Trust Company, presenting the foregoing as their Bill of Exceptions as being in complete conformity to the rules of the Court in such cases made and provided, and directing that it be filed as a part of the record in this cause, as by law and the rules of this Court prescribed.

Respectfully submitted,

MRS. JULIA CAROLINE SPONEN-

BARGER, Appellant,

By Lamar Williamson,

Monticello, Arkansas, and

By E. E. Hopson,

McGehee, Arkansas, Her Attorneys.

GRADY MILLER,

As Receiver for the Southeast Arkansas Levee District,

By Joseph W. House,

Little Rock, Arkansas, and

By Lamar Williamson,

Monticello, Arkansas, His Attorneys.

ALEX H. ROWELL and

WILLIAM R. HUMPHREY,

As Receivers for the Cypress Creek Drainage District,

By DeWitt Poe,

McGehee, Arkansas, and

By Lamar Williamson,

Monticello, Arkansas, and

By Hendrix Rowell,

Pine Bluff, Arkansas,

Their Attorneys.

CYPRESS CREEK DRAINAGE DISTRICT.

By DeWitt Poe,

McGehee, Arkansas, and

By Lamar Williamson,

Monticello, Arkansas.

**MERCANTILE-COMMERCE BANK  
AND TRUST COMPANY and  
MERCANTILE-COMMERCE NA-  
TIONAL BANK IN ST. LOUIS,**

By Fred Armstrong, Attorney, of Thomp-  
son, Mitchell, Thompson & Young, St.  
Louis, Missouri.

**ST. LOUIS UNION TRUST COM-  
PANY,**

Individually and in its own right, and  
as Trustee for Bondholders in a pledge  
and mortgage executed by the Cypress  
Creek Drainage District,

By Henry Davis, Attorney, of Bryan,  
Williams, Cave & McPheeters, St.  
Louis, Missouri.

Copy of the foregoing Bill of Exceptions received and ap-  
proved this January 7th, 1937.

**FRED A. ISGRIG,**  
United States District Attorney,  
for the defendant.

494 (Approval of Bill of Exceptions by District Judge.)

I, the undersigned United States District Judge, who pre-  
sided at the trial of the above entitled cause, do hereby cer-  
tify that the foregoing Bill of Exceptions contains all of the  
material facts, matters, things, proceedings, objections, over-  
rulings, and exceptions thereto, occurring upon the trial of  
said cause and not heretofore a part of the record herein, in-  
cluding all evidence adduced at the trial, material to the  
issues presented by the assignments of error, and I further  
certify that the exhibits set forth and included in the fore-  
going Bill of Exceptions constitute all the exhibits offered in  
evidence at the said trial which are material to the issues  
presented by the assignments of error; the Bill of Exceptions  
as a whole containing all of the evidence necessary to present  
clearly the questions of law involved in the rulings to which  
exceptions are preserved; and I hereby make all of said ex-  
hibits a part of the foregoing Bill of Exceptions; and I  
hereby settle and allow the foregoing Bill of Exceptions, as  
a full, true, correct and complete Bill of Exceptions in this  
cause and order the same filed as a part of the record herein,

and further order the Clerk of this Court to attach to  
 495 the said Bill of Exceptions all of said exhibits and to  
 transmit said entire Bill of Exceptions, including all  
 exhibits requested by either party, to the Circuit Court of  
 Appeals for the Eighth Circuit.

Done and dated this 8th day of January, A. D., 1938.

CHARLES B. DAVIS,  
 United States District Judge.

Endorsed: "Filed Jan. 10, 1938. Sid B. Redding, Clerk."

496 (Citation and Acceptance of Service.)

(Filed in U. S. District Court on January 7, 1938.)

In the United States District Court for the Western Division  
 of the Eastern District of Arkansas.

Mrs. Julia Caroline Sponenbarger; Grady Miller as Receiver  
 for the Southeast Arkansas Levee District; Alex H.  
 Rowell and William R. Humphrey, as Receivers for  
 the Cypress Creek Drainage District; Cypress Creek  
 Drainage District; Mercantile-Commerce Bank and  
 Trust Company and Mercantile-Commerce National  
 Bank in St. Louis; and St. Louis Union Trust Com-  
 pany, Appellants.

No. 7984. . . vs.

The United States of America, Appellee.

To the United States of America, and the Honorable Fred A.  
 Isgrig as United States District Attorney, attorney for  
 the defendant:

You are hereby cited and admonished to be and appear in  
 the United States Circuit Court of Appeals for the Eighth  
 Circuit in the City of St. Louis, Missouri, forty days from  
 and after the day this Citation bears date, pursuant to an  
 appeal allowed and filed in the clerk's office of the District  
 Court of the United States for the Western Division of the  
 Eastern District of Arkansas, wherein Julia Caroline Spon-  
 enbarger; Grady Miller as Receiver for the Southeast Ar-  
 kansas Levee District; Alex H. Rowell and William R.  
 Humphrey, as Receivers for the Cypress Creek Drainage  
 District; Cypress Creek Drainage District; Mercantile-Com-  
 merce Bank and Trust Company and Mercantile-Commerce  
 National Bank in St. Louis; and St. Louis Union Trust Com-  
 pany are appellants and the United States of America is ap-



497 pellee, to show cause, if any there be, why the Findings of Fact and Conclusions of Law and Judgments rendered in the above styled action should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Charles B. Davis, United States District Judge, who presided in the trial of the above styled cause in the Western Division of the Eastern District of Arkansas, this 6 day of January, in the year of our Lord, one thousand nine hundred and thirty-eight.

CHARLES B. DAVIS,  
United States District Judge.

Service of the above Citation is hereby accepted and acknowledged this 7 day of Jan., A. D. 1938.

FRED A. ISGRIG,  
United States District Attorney, and  
Attorney for the defendant in the  
above styled cause.

498 (Clerk's Certificate to Transcript.)

In the United States District Court for the Western Division of the Eastern District of Arkansas.

I, Sid B. Redding, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, do hereby certify that the annexed and foregoing writings are a true, correct and complete transcript of the record in the case of Mrs. Julia Caroline Sponenbarger vs. United States of America, No. 7984—at law, as requested by the Praecipe for Transcript filed in said case.

(Seal)  
U. S. Dist. Court  
East. Dist. of Ark.  
West. Div.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City Little Rock, State of Arkansas, this 14th day of January, A. D. 1938.

SID B. REDDING,  
Sid B. Redding as Clerk of the District Court of the United States for the Western Division of the Eastern District of Arkansas.

Filed Jan. 15, 1938. E. E. Koch, Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Mr. Lamar Williamson, Mr. E. E. Hopson; Mr. DeWitt Poe, Mr. Joseph W. House, Mr. Fred Armstrong, and Mr. Henry Davis as Counsel for Appellants.)

United States Circuit Court of Appeals, Eighth Circuit

No. 11090

MRS. JULIA CAROLINE SPONENBARGER, ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA

The Clerk will enter my appearance as Counsel for the Appellants.

LAMAR WILLIAMSON,  
*Monticello, Ark.*

E. E. HOPSON,  
*McGehee, Arkansas.*

DEWITT POE,  
*McGehee, Arkansas.*

JOS. W. HOUSE,  
*Little Rock, Ark.*

FRED ARMSTRONG,  
*St. Louis, Mo.*

HENRY DAVIS,  
*St. Louis, Mo.*

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Jan. 15, 1938.

(Appearance of Mr. A. H. Rowell, Mr. Jay W. Dickey, and Mr. Hendrix Rowell as Counsel for Appellants.)

The Clerk will enter my appearance as Counsel for the Appellants.

A. H. ROWELL,  
JAY W. DICKEY,  
HENDRIX ROWELL.

*Of the firm of Rowell, Rowell & Dickey,  
Pine Bluff, Arkansas*

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Mar. 15, 1938.

(Appearance of Mr. Fred A. Isgrig as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

FRED A. ISGRIG,  
*U. S. Atty. East. Dist. Ark.*

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Jan. 19, 1938.

(Appearance of Mr. John C. Dyott as Counsel for Appellee.)  
The Clerk will enter my appearance as Counsel for the Appellee.

JOHN C. DYOTT.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Jan. 21, 1938.

*Motion of St. Louis Union Trust Company to dismiss the appeal as to it as Trustee, etc.*

Now comes the St. Louis Union Trust Company as the owner of certain bonds issued by the Cypress Creek Drainage District and as Trustee in a mortgage and pledge instrument executed by the Cypress Creek Drainage District on February 1, 1916, and states that after the trial of this cause in the court below and after an appeal taken by it from the judgment rendered by the trial court, the bonds described in the stipulation at pages 292 and 293 of the printed transcript of the record were paid by the said District, said bonds were surrendered to said District and the said mortgage and pledge instrument was satisfied of record.

The St. Louis Union Trust Company therefore states that it, in its capacity as the owner of some of the aforesaid bonds issued by said Cypress Creek Drainage District and as Trustee in the said mortgage and pledge instrument executed by the Cypress Creek Drainage District, has no further interest in this cause.

Wherefore, the St. Louis Union Trust Company moves the Court to dismiss the appeal granted to it as the owner of bonds issued by the Cypress Creek Drainage District and as Trustee in the pledge instrument and mortgage executed by said District.

BRYAN, WILLIAMS, CAVE & MCPHEETERS,  
*Attorneys for St. Louis Union Trust Company.*

Service of the within motion is acknowledged this 18 day of August 1938.

FRED A. ISGRIG,  
*Attorney for Defendant.*

Service of the within motion is acknowledged this 22d day of August 1938.

LAMAR WILLIAMSON,  
*Attorney for Julia Caroline Sponenbarger.*

Service of the within motion is acknowledged this 22d day of August 1938.

LAMAR WILLIAMSON,  
*Attorney for Grady Miller,  
Receiver for Southeast Arkansas Levee District.*

Service of the within motion is acknowledged this 22d day of August 1938.

LAMAR WILLIAMSON,  
Attorney for Alex H. Rowell and William R. Humphrey,  
as Receivers for Cypress Creek Drainage District.

Service of the within motion is acknowledged this 22d day of August 1938.

LAMAR WILLIAMSON,  
Attorney for Cypress Creek Drainage District.

Service of the within motion is acknowledged this — day of August 1938.

THOMPSON, MITCHELL, THOMPSON & YOUNG,  
FRED ARMSTRONG,  
Attorney for Mercantile-Commerce Bank and Trust Company,  
and Mercantile-Commerce National Bank.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Aug. 23, 1938.

*Order of argument*

October Term, 1938

Monday, October 3, 1938

This cause having been called for hearing in its regular order, argument was commenced by Mr. Lamar Williamson for appellant, Mrs. Julia Caroline Sponenbarger, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

*Order of submission*

October Term, 1938

Tuesday, October 4, 1938

This cause is this day called for further hearing, and argument is continued by Mr. Lamar Williamson for appellant, Mrs. Julia Caroline Sponenbarger, by Mr. Fred Armstrong for appellant, Mercantile Commerce Bank and Trust Company, and is concluded by Mr. Fred A. Isgrig, United States Attorney, for appellee.

Thereupon, this cause is submitted to the Court on the transcript of the record from said District Court, the motion of St. Louis Union Trust Company, as owner of certain bonds, etc., and as Trustee in a mortgage and pledge instrument, etc., to dismiss the appeal allowed to it in this capacity, and on the briefs of counsel filed herein.



*Opinion*

United States Circuit Court of Appeals, Eighth Circuit

No. 11,090. November Term, A. D. 1938

MRS. JULIA CAROLINE SPONENBARGER, ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Eastern  
District of Arkansas

[February 8, 1939]

Mr. Lamar Williamson (Mr. E. E. Hopson and Messrs. Williamson & Williamson on the brief) for Appellant Mrs. Julia Caroline Sponenbarger.

Mr. Fred Armstrong (Messrs. Thompson, Mitchell, Thompson & Young, Mr. Henry Davis and Messrs. Bryan, Williams, Cave & McPheeters on the brief) for Appellant Mercantile-Commerce Bank and Trust Company, et al.

Mr. Fred A. Isgrig, United States Attorney (Mr. John C. Dyott and Mr. John S. Gatewood, Special Assistants to the Attorney General, on the brief) for Appellee.

Before STONE, WOODBROUGH, and VAN VALKENBURGH, Circuit Judges.  
VAN VALKENBURGH, Circuit Judge, delivered the opinion of the court.

Appellant Sponenbarger owns forty acres of land in Desha County, Arkansas. August 11, 1934, she filed action in the District Court of the United States for the Eastern District of Arkansas, under the Tucker Act (28 U. S. C. A. 41 [20]) for compensation for the alleged taking of her said property, claiming that its fair market value was reduced as a result of the establishment of Boeuf Floodway, which includes the land in question, under authority of the Mississippi River Flood Control Act of May 15, 1928 (33 U. S. A. 702a-702n). The destructive flood of 1927 aroused the Congress into recognition of the fact that flood control of the Mississippi River is a national problem and a national responsibility. Accordingly, December 1, 1927, the Chief of Engineers, Major General Edgar Jadwin, submitted a report to the Secretary of War embodying a project for the flood control of the Mississippi River. This report was printed as House Document Number 90, Seventieth Congress, First Session. The project submitted was commonly called the "Jadwin Plan" in honor of its author. May 15, 1928, Congress enacted a Flood Control measure (45 Stat. 534 et seq.), based upon the report of General

Jadwin. Such parts of this Act as are deemed essential or material to the issues here under consideration are:

From Sec. 1. "That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: Provided, That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, \* \* \* is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinabove provided."

From Sec. 2. "In view of the great expenditure, estimated as approximately \$292,000,000, heretofore made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required."

From Sec. 3. "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place; Provided, however, That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership

of the lands so subjected to overflow and damage or floodage rights over such lands."

From Sec. 4. "The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: Provided, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid. The Secretary of War may cause proceedings to be instituted for the acquirement of condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project."

From Sec. 9. "The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act."

May 27, 1929, the Secretary of War submitted to Attorney General Mitchell an inquiry "whether the project in House Document, 70th Congress, 1st Session, is the legal project to be executed in accordance with law, and whether this project is already fixed and not subject to review by this administration." The Attorney General, pointing out that only "engineering differences" were to be inquired into by the special board, created by the Act, "all other differences between the plans, if any, having been definitely resolved by Congress in favor of the plan of December 1, 1927," and that "questions such as the obligation to provide flowage rights, or to make compensation in connection therewith, do not fall within the term 'engineering differences,'" advised the Secretary of War that "the project set forth in House Document No. 90, 70th Congress, 1st Session, is the legal project to be executed in accordance with the law." (Opinions of Attorneys General, vol. 36, p. 80).

The district court, having made findings of fact submitted by the defendant United States, held generally that "it cannot be successfully contended that plaintiff's land has been appropriated by the defendant, thereby giving rise to an implied contract to compensate the owner." Accordingly, judgment was awarded defendant, appellee herein.

As stated by the trial court, the Jadwin Plan, adopted by the Flood Control Act of May 15, 1928, embodied an extensive flood control program in the Mississippi Valley from Cape Girardeau, Missouri, to the Head of the Passes in Louisiana.

"That portion of the plan of immediate concern in this case deals with the suggested treatment of the Mississippi River from the White and Arkansas Rivers on the north, to the Red River on the south, usually referred to as the 'Middle Section'."

The court in its opinion thus states succinctly the Jadwin Plan provision for the Boeuf Floodway and the essential features of the Floodway:

"The Jadwin plan made provision for a floodway starting shortly south of the mouth of the Arkansas River, at Cypress Creek, thence southwardly along the basin of the Boeuf River to the backwater area of the Red River in the State of Louisiana. The source of this floodway, as planned, extended along the levee on the west side of the Mississippi River from Rohwer to Luna Landing, a distance of thirty miles."

The essential features of the proposed floodway, as they were set forth in the plan adopted, were (1) a section of the riverside levee at Cypress Creek, designated a fuse plug, across the upper end of the floodway, of less height than the contiguous levee, or the levee on the opposite side of the river; this was to be provided by leaving intact and unaltered the then existing riverside levee, built and maintained at the 1914 grade and section, as established by the Mississippi River Commission. The grade of this fuse plug section was equivalent to 60.5 feet on the gauge at Arkansas City. When the river reached that stage, the water would run over the levee and into the floodway. (2) The grade of the riverside levees above and below the fuse plug section, as well as that on the east side of the river, was to be raised three feet, to effect the entry of excess flood water into the floodway. (3) A system of guide levees, on the east and the west side of the floodway to hold the water in the designated channel, and prevent it from spreading out on the lands on either side."

Appellants claim that a servitude was impressed upon plaintiff Sponenbarger's property equivalent to a taking thereof by the enactment of the Flood Control Act of May 15, 1928, and by

"The adoption of a program, and the assumption by the government of the control of the fuse plug section, because of which, it is claimed, the plaintiff is deprived of the right of 'self defense' against a threatened flood, and her land decreased in market value;"

also by

"The act of the government in raising the levee above, below and across the river from the Cypress Creek gap, thereby making it certain that in the event of a flood which the levee would not withstand, plaintiff's land would be covered with water."

The substantial defense interposed by the United States is thus stated by the trial court:

"The answer of defendant asserted (1) that the enactment of the Flood Control Act created no express or implied obligation to compensate plaintiff, or that any act of the Government done under authority of the said statute constituted a taking of plaintiff's property; and (2) that the Boeuf Floodway had by a subsequent Act of Congress been abandoned and the Eudora Floodway substituted in lieu thereof."



It thus becomes important to examine House Document No. 90 to ascertain the essential features of the Jadwin Plan which, as Attorney General Mitchell convincingly holds, is the fixed legal project to be executed in accordance with law. The practical limits of this opinion forbids more than quotation sufficient to disclose the essential features of this controlling plan and the grounds for their insistence.

From Section 3. "The recommended plan fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity, and sends the surplus water through lateral floodways."

Floodways from the Arkansas River through the Tensas Basin to the Red River to relieve the main channel of the water it cannot carry and to protect the general levees is pronounced an "essential feature" of the plan.

From Section 7. "Man must not try to restrict the Mississippi River too much in extreme floods. \* \* \* The water which cannot be carried in the main channel with the levee at reasonable height must be diverted and carried laterally. \* \* \* As a general setback is not practicable the remainder must be supplied by floodways paralleling the general course of the river."

In that way the waters of a flood of great magnitude; such as that of 1927, would be passed out to the Gulf "without danger of life in the alluvial valley, and without damage to property except in the floodways allotted for its passage." (From Section 8.)

From Section 16. "From the mouth of the Arkansas to the Old River, at the mouth of the Red, extreme floods cannot be carried between levees of the Mississippi without dangerous increase in their heights. A floodway for excess floods is provided down to the Boeuf River, on the west side of the river. \* \* \* The entrance to the floodway is closed by a safety plug section of the levee, at present grade, which is located at Cypress Creek, near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi, from the Arkansas to the Red, will be raised about 3 feet. To prevent flood waters from entering the Tensas Basin, except through the floodway during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary."

From Section 17. "The section at the head of the floodway will protect the land within the floodway levees against any flood up to one of the magnitude of the 1922 flood. A flood of a magnitude somewhere between that of 1922 and of 1927 will break it, turning the excess water down the floodway, which will carry it safely to the backwater area at the mouth of the Red River."

From Section 119. "The Boeuf River bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swampland."

From Section 120. "The United States must have control over the Cypress Creek levee and keep it substantially at its present strength and present height."

From Section 121. "The remainder of the alluvial valley, on each side of this stretch of the river, barring accident, will have complete protection from all possible floods."

The average height that other levees are to be raised is approximately three and one-half feet. The Cypress Creek levee is to remain at the 1914, or present, level. Levees generally were to be constructed where necessary to prevent the floodwater of any one of the great basins from flowing into the basin below it "except through the relief or fuse plug levees intended to carry off the excess waters during high floods."

From Section 140. "Since the protection and preservation of the flood-discharge capacity of the alluvial valley of the Mississippi River is requisite to the common welfare of the Nation and to the preservation of the many lines of interstate commerce which cross the valley, it should be protected and preserved by similar legislation. The warning cannot be too strongly emphasized that unless the flood-discharge capacity provided in the plan herein recommended is preserved, a future great flood will result in a disaster as great as or greater than that experienced this year."

The importance of the Mississippi River and the damage of its floods to the general welfare is thus stated in various sections of the Jadwin Plan:

"The Mississippi River is the world's greatest river, combines size with usefulness, and is one of the grandest and most valuable assets of the United States."

"Through its aid to drainage, navigation, water supply power, manufacturing, agriculture, and other incidental uses, it renders vital service to over 40 percent of the area of the country. Its waters come from 31 States, and were it not for the levees, would in flood cover 30,000 square miles, a territory greater than many of our States."

"Its alluvial valley has a growing population and contains the largest area of the richest land in the United States."

"Its worst characteristic is that its floods inflict at times great damage upon the people and property in the alluvial valley of the lower river. They take their toll in life and in damage to property, affecting the inhabitants of the valley and investors, manufacturers, and consumers throughout the country. They interfere with the food supply and the general welfare of the country, with its postal service, and transcontinental and other interstate commerce."

From the foregoing it will be seen that the essential feature of the Jadwin project, as distinguished from previous plans and practices, is the diversion of flood waters from the main river channel, and their discharge through established floodways of which the Boeuf Floodway is one. By this means it is expected that at least 20,550 square miles of the 30,000 square miles of the alluvial valley will be protected

annually, "without damage to property except in the floodways." "The levees generally will be raised about three feet, so that the selected weaker relief levees will be at about the elevation of the present (1914) levee top, and will surely serve their purpose." The control of the Mississippi River by levees alone is found to be impracticable. It appears beyond question that the Boeuf Floodway is a planned floodway; that the Congress has created and established such floodways in the exercise of its power over transcontinental and other interstate commerce, and its conceded right to protect the general public in matters so closely related to the general welfare.

The plan, adopted by the Congress as a fixed project in all its essential features, provides that the United States must have control of the Cypress Creek levee and keep at its (then) present strength and height. Without question in the passage of this Act, Congress has assumed control of this fuse plug, and, by entering a field within its jurisdiction, has excluded all local interference with its national powers. The contention of counsel for appellants is that the restriction of this fuse plug levee to its 1914 strength and height, while other levees, especially above and below on the west side of the river, and those on the east side of the river are raised in height, throws an additional burden upon the Cypress Creek levee protecting lands lying in the Boeuf River bottom. The plan is to direct excessive flood waters into this floodway, thereby lowering the safety and protection of these lands as compared with others situated in this same section of the alluvial valley. In fact the frankly stated object of the Jadwin plan is to protect more than two-thirds of the valley at the expense of potential damage to property in the floodways in the event of excessive floods. Such discrimination is wanting in the absence of government control of levees, and in the existence of local responsibility for levee or other flood protection.

It will be recalled that Section 3 of the Act provides that "no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place"; but Section 4 directs that the United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the river, and the Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of lands, easements, or rights of way. These two sections are entirely consistent. Appellant Sponenbarger claims that a servitude has been placed upon her land by the creation of this essential floodway in which the land is situated. That the diversion from the main channel of the river is now a fixed fact in case of excessive floods, instead of a casual and incidental happening in case of local responsibility, now placed beyond her control by virtue of the Act of May 15, 1928.

It is true that the Boeuf River Basin has been flooded occasionally in past years. So, likewise, have other lands in this section of the alluvial valley now sought to be comparatively, if not absolutely,

that the lands in the Boeuf Floodway must necessarily be flooded by diversion of waters from the main channel in case of the excessive floods feared and in contemplation by this Flood Control Act. The United States has not caused proceedings to be instituted for the requirement of such flowage rights or easements, and appellant claims that the market value of her land has been greatly impaired by the flood and servitude thus cast upon it, and that this constitutes a taking within the meaning of the Tucker Act. Of course, it is not contended that the land is actually physically appropriated, and all citations purporting to deal with such a situation are largely, if not entirely, beside the point.

"The fact that condemnation proceedings were not instituted, and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary." *Jacobs v. United States*, 290 U. S. 13, 16.

The appropriation of private property for a public use requires the return of a full and exact equivalent to the owner. That equivalent in case of complete appropriation is the market value of the property at the time of the taking, contemporaneously paid in money. In case an easement only is impressed and taken, the rule is to determine the fair market value before the easement is imposed, next to find that value after the taking, and the difference is the amount of liability. *Olson v. United States*, 292 U. S. 246.

In *Hurley v. Kincaid*, 285 U. S. 95, an owner of land within the proposed channel of the Boeuf Floodway, part of the plan now under consideration, brought suit to enjoin the carrying out of the work in the floodway without proceedings first having been instituted to condemn his land or the flowage rights thereon. The District Court of the Western District of Louisiana, held that a right of action was alleged, and granted the injunction prayed. (35 F. [2d] 335, and 37 F. [2d] 602.) The latter decree was affirmed by the Court of Appeals for the Fifth Circuit. *United States v. Kincaid*, 9 F. (2d) 768. The supreme Court, in reversing the case, had no occasion to determine, nor did it determine, any of the controverted issues of fact or propositions of substantial law, but said:

"We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of it—as soon as the Government begins to carry out the project authorized. (Citing, among other cases, *United States v. Lynah*, 188 U. S. 445, 469; *United States v. Cress*, 243 U. S. 316, 328; and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 329.) If that which has been done, or is contemplated does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract." *Hurley v. Kincaid*, 285 U. S. 1. c. 103, 104.



In *United States v. Lynah*, supra, it is said:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law \* \* \* it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to a total destruction without making any compensation, because in the narrowest sense of that word it is not taken for the public use" (I. c. 469).

In *United States v. Cress*, supra (I. c. 328), it is said:

"There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows."

And in *Portsmouth Harbor Land & Hotel Company v. United States*, cited above, it is held that "where acts amount to a taking of property by the United States, without assertion of an adverse right, a contract to pay may be implied whether it was thought of or not." But in this case, as we have seen, the purpose to pay was not only thought of, but expressly contemplated. In *Sanguinetti v. United States*, 264 U. S. 146, liability of the United States *ex contractu* was denied where "it did not appear either that the flooding was intended or anticipated by the Government or its officers, or that it was attributable directly, in whole or in part, to the Improvement, rather than to natural conditions." Such holdings are to be found in cases involving improvements to navigation, subject to the absolute power of Congress, where the flooding resulting is in its nature indirect and consequential instead of the direct objective of the Congressional Act. *Bedford v. United States*, 192 U. S. 217; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53.

In the instant case the government has not merely begun to carry out the project authorized by the Act of May 15, 1928. The essential features of the Boeuf Floodway as contemplated by the Act and by House Document No. 90 have been established for several years. The Floodway stands ready to carry off the excess waters of major floods in accordance with the provisions of that legislation. Obviously the omission of immaterial details could not affect efficient operation of this essential feature of the flood-control plan. The testimony is that at the time this suit was filed in 1934 this plan was at least 80 percent complete. The United States began actual construction of this project under the Flood Control Act in January 1929. The so-called incomplete feature of the plan represents the failure to build the guide levees intended to limit the width of the floodways in the Boeuf and Atchafalaya Basins. Accordingly expert engineering witnesses testify that the Boeuf Floodway was 90 percent complete when this suit was tried in the district court. The trial court was of opinion that the fact that sections of the levee, both at the lower and upper ends of the fuse plug proper, were also left temporarily at the 1914 grade gives to plaintiff's land the same levee protection "as all other

alluvial lands in that section." To this we cannot agree. Section 702a provides that "pending completion of any floodway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees *on the west side* of the river contiguous to the levee at the head of said floodway (the fuse plug proper), but nothing shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project *on the east side* of the river, including raising, strengthening, and enlarging the levees *on the east side* of the river." [Italics supplied.] This comprehensive plan binds together the lands on both sides of the river as parts of the same section of the alluvial valley. The temporary retention of the 1914 grade for a small space on each side of the fuse plug proper, but serves temporarily to enlarge that fuse plug. This entire section would go with any excessive flood that required diversion from the main channel as planned; and the plan provides that this fuse plug shall be "blown," or crevassed, if that is found necessary to facilitate and hasten diversion.

The guide levees within the Boeuf basin were not necessary to this essential feature of the project. They would serve merely to limit the quantity of the lands subject to diversion overflow. But the Sponenbarger land is menaced in either case. The presence of these guide levees would in no sense lessen the probability or possibility of a destructive crevasse at the Cypress Creek levee.

It is next urged that the Boeuf Floodway has, by a subsequent Act of Congress, been abandoned, and the Eudora Floodway substituted in lieu thereof. The Act of June 15, 1936, did provide for a modification of the 1928 Act, and the construction of what was described as the Eudora Floodway. As stated by the trial court, "its general course is much the same as the Boeuf Basin, but it clings closer to the west bank of the Mississippi." It contains little more than one-half the total acreage of the Boeuf Basin, but in it equally lies the Sponenbarger land. The Act of 1936 (33 U. S. C. A. 702a-2) provides that the Boeuf Floodway shall be abandoned as soon as the Eudora Floodway is in operative condition. Not only is the Eudora Floodway not in operative condition, but its ultimate construction is now regarded as extremely doubtful, owing to apparently irreconcilable disagreements between the government and local authorities over the terms of acquiring flowage easements.

At any rate the Boeuf Floodway is, and is recognized to be, in operative existence, and stands ready to discharge its functions planned in case of excessive flood. It is true that the Boeuf Basin has, like other parts of this alluvial section, been subject to occasional overflow. At times, like such other parts, it has escaped. By the provisions of this plan of flood control it is subjected to a planned and practically certain overflow in case of the major floods contemplated and described. No one can foretell when such may occur, but that is the only remaining uncertainty in the premises. If, and when, such floods do occur, serious destruction must be conceded. So considered, a reasonable construction of Section 4 of the Act of May 15, 1928,

must regard such as the "additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River," for which the United States shall provide flowage rights. (Section 4, Act May 15, 1928.) The fuse plug levee is the "spillway" of which the Act speaks, and the "floodway" is the path of the flood within the Boeuf Basin.

It is true that the mere raising of levees on one side of a river is not, in effect, the taking of land on the other side. *Jackson v. United States*, 230 U. S. 1. That case involved works constructed for the benefit of navigation, and the damages involved were therefore held to be remote and consequential. The United States had adopted no comprehensive plan for flood control; consequently it was held not to be responsible for damages resulting from overflow, or for failure to construct additional levees along the Mississippi River valley to afford protection from increased overflow caused by levees constructed at other points by state and federal authority.

The Mercantile-Commerce Bank and Trust Company, Mercantile-Commerce National Bank, and St. Louis Union Trust Company, appellants, were joined as additional parties plaintiff on motion of defendant. They appear as lien claimants who are trustees for the local Arkansas Levee District, and for the bondholders thereof under bond pledge agreements. They favor the recovery of compensation, but insist that, as such trustees, they should participate in any action which seeks to fix the total amount thereof, or which seeks to determine the interest of any particular party therein. The truly critical issue, as stated in their briefs, very well summarizes what has already been said:

"The Government has deprived the Boeuf Basin landowners of property, to-wit: Of certain of the attributes of their property rights in the land in the Boeuf Basin, by designing and constructing a levee system deliberately intended to sacrifice the Boeuf Basin lands for the benefit of a much larger group and for the public good and, among other things, has deprived the Boeuf River landowners of that particular attribute of their property which consisted of their common-law right to protect their lands against floods by raising and strengthening their protective levees and by giving the Government the right to sacrifice even the existing levees when necessary to accomplish the general purpose. The lien claimants are not contesting the wisdom of the plan nor the right of the government to adopt it, but are only insisting that the few who are sacrificed for the benefit of the many be compensated either by the many or at public expense."

The trial court, having found against appellant Sponenbarger said: "In view of this conclusion it is not conceived to be necessary to make any findings as to the interveners."

We have given very careful consideration to this record and to the able and painstaking analysis of the learned trial judge in findings and opinion. We find ourselves unable to concur in the conclusion that no recovery against the government can result from the easement appropriated and the servitude that has been impressed

upon the land of appellant Spokenbarger. The fact that the ascertainment of just and adequate compensation will not be a simple matter in view of the complexity of the elements that are said to enter into and condition the computation cannot be permitted to interfere with the constitutional rights of the parties.

Our conclusion is that the judgment must be reversed, and the cause remanded to the district court for further proceedings not inconsistent with the views herein expressed.

WOODBROUGH, Circuit Judge, dissenting.

I dissent because it has appeared to me that the judgment of the trial court ought to be affirmed on the grounds set forth in its opinion.

### *Judgment*

United States Circuit Court of Appeals, Eighth Circuit

November Term, 1938

Thursday, February 9, 1939

No. 11090

MRS. JULIA CAROLINE SPONENBARGER; GRADY MILLER, AS RECEIVER FOR THE SOUTHEAST ARKANSAS LEVEE DISTRICT; ALEX H. ROWELL AND WILLIAM R. HUMPHREY, AS RECEIVERS FOR THE CYPRESS CREEK DRAINAGE DISTRICT; CYPRESS CREEK DRAINAGE DISTRICT; MERCANTILE-COMMERCE BANK AND TRUST COMPANY AND MERCANTILE-COMMERCE NATIONAL BANK IN ST. LOUIS; AND ST. LOUIS UNION TRUST COMPANY, APPELLANTS

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Eastern District of Arkansas

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court filed herein February 8, 1939.

FEBRUARY 9, 1939.



*Petition for rehearing*

In the United States Circuit Court of Appeals, Eighth Circuit

No. 11090—At Law

MRS. JULIA CAROLINE SPONENBARGER ET AL., APPELLANTS

UNITED STATES OF AMERICA, APPELLEE

The United States of America, the appellee in the above-styled case, files this its petition for a rehearing, and for grounds therefor alleged:

## I

In holding that the defendant Government by the Flood Control Act of May 15, 1928 (33 U. S. C. A. 702a-702n) had taken from the appellant and owners of lands similar situated, the right of self-protection by taking absolute and exclusive control of the fuse-plug section of the levee for the purpose of maintaining it at its 1914 grade and section, and for the ultimate purpose of flooding the lands in the Boeuf Basin, including appellant's land, the court overlooked (1) Committee Document No. 2, 71st Congress (R. 252), a letter from the then Secretary of War stating that there was no law preventing the landowners in the Boeuf Basin from raising the fuse-plug, and that the states should be called on to enact such legislation as would maintain the levee at its 1914 height and grade, and that would make provision for compensating the landowners for the deprivation of the right of self-protection; that because the states were benefited by the Flood Control Act and work to be done thereunder, it was their duty to thus legislate and provide for compensation for their own citizens; (2) and the testimony of Col. Oliver, District Engineer located at Vicksburg, that it had always been the understanding of the War Department that they had no control over the fuse-plug levee, and that the landowners were at liberty to raise it to any height they desired (R. 252); and the court overlooked the fact that no provision is found in the Flood Control Act May 15, 1928, for the taking and maintaining control over the fuse-plug by the United States government; and before an act may be construed as an expression of an intent to take private property, that intent must be positively and definitely expressed, and such intent will not be inferred in the absence of an overt act constituting a taking.

## II

In holding that the appellee government, by enactment of the Flood Control Act May 15, 1928, by its Congress, had taken an easement of flowage rights over the land of the appellant, the court overlooked the fact, shown by undisputed evidence, that her land had always been in a floodway and frequently flooded to a depth of from ten to

twenty feet; and the court overlooked the fact that there is no evidence in the record that any additional destructive floodwaters will result from maintaining the fuse plug at its 1914 height and grade.

### III

In holding that the appellee government, by the enactment of the Flood Control Act of 1928 by its Congress, had taken an easement of flowage rights over the lands of the appellant and other lands similarly situated, and that it was the purpose and intention of the Government, by virtue of said Act to subject appellant's lands and other lands similarly situated, to additional floodwaters, the court overlooked the undisputed fact that the appellee government has expended many millions of dollars in corrective dredging and in shortening the channel of the Mississippi River 100 miles between Arkansas City and the mouth of the Red River in Louisiana, and that by reason of this engineering work, it was shown, and undisputed, that a flood, even of the magnitude of the 1927 flood, would have safely passed the fuse-plug, and would do so now, and that the flood of 1927 was an unprecedented flood, and that these undisputed facts show conclusively that instead of taking appellant's land as a floodway, she now enjoys a greater degree of protection than her land had before the enactment of the Flood Control Act of 1928.

### IV

In holding that the appellee government, by enactment of the Flood Control Act of 1928 by its Congress, had taken an easement of flowage right over the land of the appellant and over other lands similarly situated, the court overlooked the fact that, the government, not having lowered or otherwise impaired the fuse-plug levee, if, by reason of some superflood in the future, the flood waters of the Mississippi River should overtop the levee, the same result would have followed had the Flood Control Act not been passed by the national Congress.

### V

In holding that the appellee government, by enactment of the Flood Control Act of 1928 by its Congress, under which the levees on the east bank of the Mississippi River had been raised at some points, and the levees on the west bank of the river, south of Arkansas City had also been raised three feet, and that by reason of such work by the Government, appellant's land had been subjected to increased danger, and the protection afforded by the fuse-plug levee had been mitigated, the court overlooked the undisputed fact that, by reason of additional work done by the Government engineers, appellant enjoys now a greater degree of security from floods than ever before, and that for a period of ten years, since the passage of said Act the lands in the Boeuf Basin have been free of flood waters, whereas, prior thereto, they had been subjected to frequently recurring and destructive floods.

## VI

The court holds that by the Flood Control Act of 1928 Congress enacted into law the recommendation of the chief of engineers of the War Department, General Jadwin, known as the Jadwin Plan. The court overlooked the fact that, according to the letter of recommendation of General Jadwin to the War Department, the General emphatically called attention to the fact that floods could not be controlled by levees south of the Arkansas River, and that according to the opinion of General Jadwin, expressed in his report known as the Jadwin Plan, it would have been hazardous to raise the fuse plug, saying thereby that to do so would have imperiled the appellant's land and placed it in a position of greater danger from floods than existed by leaving the fuse-plug at its 1914 grade and height.

## VII

In holding that appellee Government by the Flood Control Act of 1928 had subjected appellant's land to an additional servitude in the nature of a floodway and was therefore liable to the appellant for the value of such flowage rights, the court overlooked the fact and the law that appellant's land being in a flood area of a navigable stream, though privately owned, was already subject to the servitude of the Government in respect to any work authorized by Congress under its constitutional powers. (Vide, cases cited in appellee's brief under this head.)

The appellee, therefore, prays that a rehearing of this cause be granted, and that the judgment of the District Court for the Eastern District, Western Division of Arkansas, be affirmed.

Respectfully submitted.

UNITED STATES OF AMERICA,  
FRED A. ISGRIG,  
*United States District Attorney,*  
JOHN S. GATEWOOD,

*Special Assistant to the Attorney General,  
For Petitioner.*

I, Fred A. Isgrig, hereby certify that I am United States District Attorney for the Eastern District of Arkansas, and that I am one of the attorneys for the United States of America, the appellee herein, and that, in my opinion, as such counsel, the grounds of the foregoing petition for rehearing in said cause are well founded in law, and is filed in good faith and he believes same to be meritorious, and that the same is proper to be presented and filed.

FRED A. ISGRIG,  
*Attorney for United States of America.*

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Feb. 20, 1935.

*Order denying petition for rehearing*

November Term, 1938

Tuesday, February 27, 1939

The petition for rehearing filed by counsel for appellee in this cause having been considered, It is now here ordered by this Court that the same be, and it is hereby, denied.

FEBRUARY 27, 1939.

*Motion for stay of issuance of mandate*

Comes now the appellee above named, United States of America, and respectively moves this Honorable Court to stay the mandate in the above entitled cause and not to permit the same to be issued out of said cause until the further orders of the Court, pursuant to the Rules of the Court, on the ground and for the reason that appellee expects and intends, in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on writ of certiorari the decision and judgment herein rendered in favor of the appellant and against the appellee:

Wherefore, appellee prays that this Court make and enter an appropriate order herein staying the issuance of the mandate in the above entitled action for a period of thirty (30) days or until further orders of this Court.

UNITED STATES OF AMERICA,  
By FRED A. ISGRIG,

*United States District Attorney  
for the Eastern District of Arkansas.*

STATE OF ARKANSAS,  
*County of Pulaski.*

Fred A. Isgrig, upon oath, states:

That he is United States District Attorney for the Eastern District of Arkansas and that he is one of the attorneys for the Appellee and Petitioner, United States of America; that he has served a copy of the above and foregoing motion on Appellant, Mrs. Julia Caroline Sponenbarger at Arkansas City, Arkansas, and to her counsel, Hon. Lamar Williamson, Monticello, Arkansas, and to E. E. Hopson, McGehee, Arkansas; said copies being mailed by regular United States mail and with postage fully paid and that same were deposited in the Post Office at Little Rock, Arkansas, on the 4th day of March 1939.

FRED A. ISGRIG.

Subscribed and sworn to before me this 4th day of March 1939.

GRADY MILLER, Clerk.

By T. D. GOLDSBY, D. C.

[Enforced:] Filed in U. S. Circuit Court of Appeals, Mar. 6, 1939.



*Order staying issuance of mandate*

November Term, 1938

Tuesday, March 7, 1939

On Consideration of the motion of appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

MARCH 7, 1939.

*Motion of appellee for further stay of mandate*

[Western Union Telegram]

LITTLE ROCK, ARK.,

6 115P, 1939, Apr. 6, PM 1 26.

Honorable E. E. KOCH,

*Clerk, U. S. Circuit Court of Appeals, St. L.*

Advised by Department of Justice that question of certiorari in Sponenbarger case under consideration by Solicitor General; That I will be advised promptly of his decision. I am instructed to secure, if possible, further stay of mandate. The question one of such great importance it should be determined by highest Court before any further action is taken in case. Please secure, if possible, further stay of mandate.

FRED A. ISGRIG,

*U. S. Attorney.*

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Apr. 6, 1939.

*Order further staying issuance of mandate*

March Term, 1939

Saturday, April 8, 1939

On Consideration of the motion of Appellee for a further stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari. It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, further stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with

the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

APRIL 8, 1939.

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Arkansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true, and complete copies of the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein Mrs. Julia Caroline Sponenbarger et al. were Appellants and the United States of America was Appellee, No. 11090; as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of April, A. D. 1939.

[SEAL]

E. E. KOCH,  
*Clerk of the United States Circuit Court  
of Appeals for the Eighth Circuit.*



## Supreme Court of the United States

*Order allowing certiorari*

Filed June 5, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 845, Frank-  
n, et al. vs. United States of America.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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